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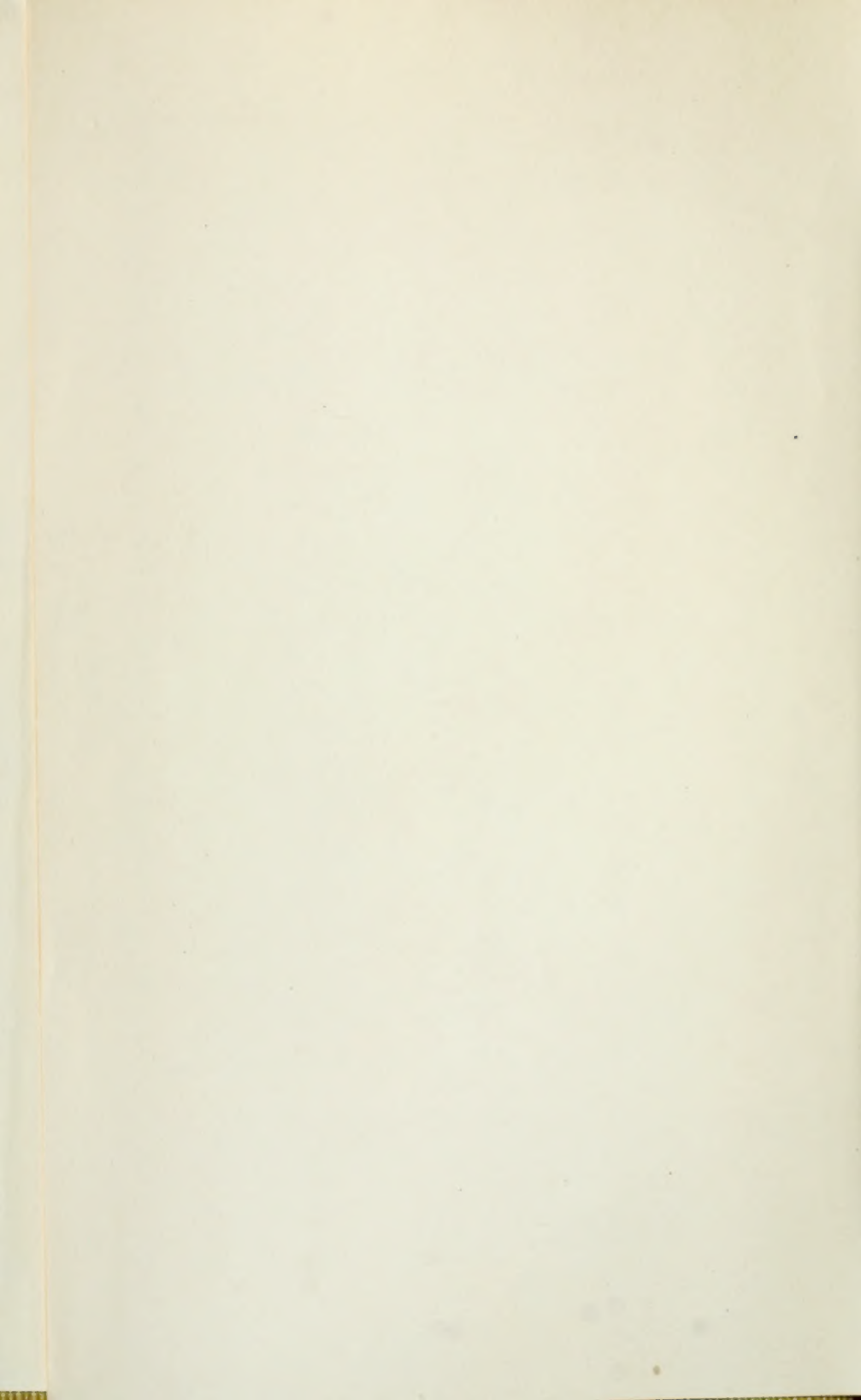
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No. 2324

IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT

LADD & TILTON BANK, a Corporation,

Plaintiff in Error,

VS.

LEWIS A. HICKS COMPANY, a Corporation,

Defendant in Error.

Writ of Error to the United States District Court  
for the District of Oregon.

TRANSCRIPT OF RECORD.


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Court of appeals  
845



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Plaintiff in Error,

vs.

LEWIS A. HICKS COMPANY, a Corporation,  
Defendant in Error.

---

**Names and Addresses of Attorneys  
upon this Writ:**

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**For the Plaintiff in Error:**

Wood, Montague & Hunt,  
Spaulding Bldg., Portland, Ore.

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**For the Defendant in Error:**

Chamberlain, Thomas & Kraemer,  
Chamber Commerce Bldg., Portland, Ore.

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## INDEX.

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	Page
Answer .....	7
Assignments of Error.....	197
Attorneys, Names and Addresses of.....	A
Bill of Exceptions.....	43
Bond on Writ of Error.....	224
Citation on Writ of Error.....	227
Complaint .....	1
Exceptions, Bill of .....	43

### EXHIBITS:

Plaintiff's Exhibit No. 1—Financial State- ment Submitted by Sullivan Fireproof Partition Company .....	68
Plaintiff's Exhibit No. 2—Assignment of Funds Due Sullivan Fireproof Parti- tion Co.....	73
Plaintiff's Exhibit No. 3—Promissory Note, Dated Dec. 18, 1911, Sullivan Fireproof Partition Co. to Ladd & Tilton Bank...	75
Plaintiff's Exhibit No. 4—Promissory Note, Dated Dec. 18, 1911, Sullivan Fireproof Partition Co. to Ladd & Tilton Bank...	76
Plaintiff's Exhibit No. 5—Promissory Note, Dated Jan. 17, 1912, Sullivan Fireproof Partition Co. to Ladd & Tilton Bank...	77
Plaintiff's Exhibit No. 6—Letter Dated April 3, 1913, Lewis A. Hicks Co. to Sullivan Fireproof Partition Co.....	81

Index.	Page
EXHIBITS—Continued:	
Plaintiff's Exhibit No. 7—Agreement Dated April 29, 1911, J. D. Sullivan and Lewis A. Hicks Co.....	165
Plaintiff's Exhibit 8—Bond, Dated Nov. 3, 1911, U. S. Fidelity and Guaranty Co.— Lewis A. Hicks Co.....	180
Plaintiff's Exhibit No. 9, Stipulation Rela- tive to .....	192
Defendant's Exhibit A—Agreement, Lewis A. Hicks Co.—School District No. 1, etc. ....	184
Judgment .....	42
Motion of Plaintiff for Judgment on Pleadings, and for Verdict and Judgment on Pleadings and Testimony.....	62
Motion to Strike Testimony of A. C. Sullivan Relative to Claim of Acme Cement Plaster Co., etc.....	48
Names and Addresses of Attorneys.....	A
Opinion .....	35
Order Allowing Writ of Error, and Fixing Amount of Bond .....	196
Order Enlarging Time to File Record and Docket Cause in Appellate Court.....	229
Order Settling and Allowing Bill of Exceptions.	194
Pétition for Writ of Error.....	195
Reply to Answer, Second Amended.....	18
Second Amended Reply to Answer.....	18
Stipulation Relative to Plaintiff's Exhibit No. 9 .....	192



## Index.

Page

## TESTIMONY ON BEHALF OF PLAINTIFF:

BUSH, J. H. .... 161

Recalled in Rebuttal..... 164

HOWARD, ROBERT S. .... 65

Cross-examination..... 87

SULLIVAN, A. C. ....47, 50, 90

Cross-examination.....44, 46, 55, 100

TESTIMONY ON BEHALF OF DEFEND-  
ANT:

KATZ, FRED A. .... 137

Cross-examination..... 140

Redirect Examination .....152, 154

Recross-examination..... 154

SULLIVAN, A. C. ....111, 156, 163

Cross-examination .....122, 158

Redirect Examination ..... 134

Recross-examination.... 135

THOMAS, WARREN E. .... 155

Writ of Error..... 226



*In the District Court of the United States for the  
District of Oregon.*

Be it Remembered, that on the 25 day of June, 1912,  
there was duly filed in the District Court of the  
United States for the District of Oregon, a Com-  
plaint, in words and figures as follows, to wit:

**[Complaint.]**

*In the District Court of the United States in and for the  
District of Oregon.*

LADD & TILTON BANK, a corporation,  
Plaintiff,

vs.

LEWIS A. HICKS COMPANY, a corporation,  
Defendant.

Comes now the above named plaintiff, Ladd &  
Tilton Bank, and for cause of action against the above  
named defendant complains and alleges as follows:

I.

That plaintiff is a corporation duly incorporated,  
organized and existing under and by virtue of the  
laws of the State of Oregon, with its office of prin-  
cipal place of business in the City of Portland, County  
of Multnomah and State of Oregon.

II.

That the defendant, Lewis A. Hicks Company, is a  
corporation duly incorporated and existing under and  
by virtue of the laws of the State of Nevada.

III.

That the matter or sum in controversy exceeds, ex-



clusive of interest and costs, the sum of three thousand dollars and is to wit, three thousand six hundred dollars (\$3,600.00).

#### IV.

That heretofore the above named defendant, Lewis A. Hicks Company, entered into a contract with School District No. 1 of Multnomah County, Oregon, wherein said contract the said Lewis A. Hicks Company agreed to construct, build and complete a certain school house within the City of Portland, County of Multnomah and State of Oregon, and within School District No. 1 aforesaid, which said school house is popularly known as the new Lincoln High School.

#### V.

That thereafter the Lewis A. Hicks Company, the above named defendant, entered into a certain contract with Sullivan Fireproof Partition Co., a corporation, wherein and whereby the Sullivan Fireproof Partition Co. contracted to do certain work in connection with the said new Lincoln High School aforesaid. The contract price to be paid the Sullivan Fireproof Partition Co. upon the completion of its contract with the Lewis A. Hicks Company as aforesaid was seventeen thousand five hundred dollars (\$17,500.00).

#### VI.

That heretofore the Sullivan Fireproof Partition Co. became indebted to Ladd & Tilton Bank, the within named plaintiff, and in order to secure the repayment to said Ladd & Tilton Bank of all sums

which were due or might thereafter become due to the said Ladd & Tilton Bank from the Sullivan Fireproof Partition Co. the Sullivan Fireproof Partition Co. did, on the 18th day of December, 1911, make, execute and deliver unto said Ladd & Tilton Bank an assignment of all moneys that might become due from the Lewis A. Hicks Company to the Sullivan Fireproof Partition Co., which said assignment was duly accepted in writing by the Lewis A. Hicks Company. Said assignment and acceptance thereof is in words and figures as follows, to wit:

“Portland, Ore., Dec. 18, 1911.

Lewis A. Hicks Company,

Worcester Bldg., City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all monies now due and all that may become due on that certain contract between yourselves and the undersigned for the partition work in the new Lincoln High School in this city. This order is meant to cover only as to payments and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,

SULLIVAN FIREPROOF PARTITION CO.

J. D. Sullivan, Pres.

A. C. Sullivan, V. Pres.  
and Sec’y.

Accepted,

LEWIS A. HICKS COMPANY,

By George Wagner, Mgn.”

## VII.

That thereafter, pursuant to the terms of said assignment, the Lewis A. Hicks Company paid unto Ladd & Tilton Bank all moneys which were due from time to time on account of said contract between the Sullivan Fireproof Partition Co. and the Lewis A. Hicks Company as aforesaid. That in order to facilitate the completion of the contract and to accommodate the Sullivan Fireproof Partition Co. the said Ladd & Tilton Bank agreed to reimburse itself for all indebtedness due it from the Sullivan Fireproof Partition Co. from the last moneys due from Lewis A. Hicks Company on account of said contract as aforesaid, and in pursuance thereof the said Ladd & Tilton Bank, upon payment to it by Lewis A. Hicks Company of various sums due from time to time under said contract, did turn over all of said moneys unto the Sullivan Fireproof Partition Co.

## VIII.

That heretofore the Sullivan Fireproof Partition Co. completed its contract with the Lewis A. Hicks Company and on April 3, 1912, the Lewis A. Hicks Company notified the Sullivan Fireproof Partition Co. and Ladd & Tilton Bank that on or about May 1, 1912, there would be due on account of said contract between the Sullivan Fireproof Partition Co. and the Lewis A. Hicks Company the balance of said contract price aforesaid, to wit, the sum of forty-three hundred dollars (\$4300.00), of which said sum the Lewis A. Hicks Company was willing to pay seven

hundred dollars (\$700.00) on said date, to wit, April 3, 1912, and would pay the balance on May 1, 1912: the said notification being in words and figures as follows, to wit:

“Apr. 3rd, 1912.

Sullivan Fireproof Partition Co.,  
City.

Gentlemen:

As your work has been completed on the Lincoln High School there will be due you on or about May 1st the balance of \$4300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,

LEWIS A. HICKS COMPANY,

By Fred A. Katz.”

FK:KT

## IX.

That after the said assignment dated December 18, 1911, had been duly accepted by the Lewis A. Hicks Company and after the said Lewis A. Hicks Company had notified the Sullivan Fireproof Partition Co. and Ladd & Tilton Bank of the balance due under said contract and named the date when the same would be paid on account of said contract, Ladd & Tilton Bank in reliance upon the terms of said notification dated April 3, 1912, released unto the said Sullivan Fireproof Partition Company seven hundred dollars

(\$700.00) of the balance due under said contract between the Sullivan Fireproof Partition Co. and the Lewis A. Hicks Company aforesaid.

X.

That the indebtedness of the Sullivan Fireproof Partition Co. to Ladd & Tilton Bank has not been and is not now repaid and that heretofore Ladd & Tilton Bank has made demand upon the Lewis A. Hicks Company for the payment of thirty-six hundred dollars (\$3600.00), the same being the balance of the money due to the said Ladd & Tilton Bank by virtue of the assignment of the Sullivan Fireproof Partition Co. to Ladd & Tilton Bank as herein set out, the said money being due on account of the contract between the Lewis A. Hicks Company and the Sullivan Fireproof Partition Co. as aforesaid, and the said Lewis A. Hicks Company refused and now refuses to pay the same.

XI.

That there is now due Ladd & Tilton Bank by virtue of the assignment of the Sullivan Fireproof Partition Co. to Ladd & Tilton Bank and as herein set out, the full sum of thirty-six hundred dollars (\$3600.00).

WHEREFORE, Ladd & Tilton Bank prays judgment against Lewis A. Hicks Company in the sum of thirty-six hundred dollars (\$3600.00), together with interest thereon at the rate of six per cent per annum from the first day of May, 1912, and for its costs and disbursements incurred herein.

WOOD, MONTAGUE & HUNT,  
Attorneys for Ladd & Tilton Bank.



[Endorsed]: Complaint. Filed June 21, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 14 day of September, 1912, there was duly filed in said Court, an Answer, in words and figures as follows, to wit:

**[Answer.]**

(Title.)

Now comes the above named defendant, and for answer to the complaint in the above entitled action, admits, denies and alleges as follows:

I.

Admits Paragraph I, II, III, IV, and V of Plaintiff's complaint.

II.

Admits the execution of the assignment described in Paragraph VI of said complaint, but denies any knowledge or information sufficient to form a belief as to the remaining portion of said Paragraph.

III.

Admits that thereafter, pursuant to the terms of said assignment, the Lewis A. Hicks Company paid unto Ladd & Tilton Bank, all moneys which were due from time to time on account of said contract between the Sullivan Fireproof Partition Co. and the Lewis A. Hicks Company as aforesaid, but denies any knowledge or information sufficient to form a belief as to the remainder of Paragraph VII of said complaint.

## IV.

Admits that theretofore the Sullivan Fireproof Partition Co. completed its contract with the Lewis A. Hicks Company, and admits the execution of the notification described in Paragraph VIII of said complaint, but denies any knowledge or information sufficient to form a belief as to the remainder of said Paragraph VIII.

## V.

Admits that Ladd & Tilton Bank paid the sum of Seven Hundred (\$700.00) Dollars referred to in Paragraph IX of said complaint, but denies any knowledge or information sufficient to form a belief as to the remainder of said Paragraph.

## VI.

Denies any knowledge or information sufficient to form a belief as to whether the indebtedness of the Sullivan Fireproof Partition Co. to Ladd & Tilton Bank has not been, or is not now, repaid; admits that heretofore Ladd & Tilton Bank has made demand upon the Lewis A. Hicks Company for the payment of Thirty-six Hundred (\$3600.00) Dollars, and that the Lewis A. Hicks Company has refused and now refuses to pay the same, but denies all the remaining portion of Paragraph X of said complaint.

## VII.

Denies Paragraph XI of said Complaint.

For a further and separate answer and defense to said complaint, defendant alleges:

## I.

That plaintiff is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal office or place of business in the City of Portland therein.

## II.

That the defendant, Lewis A. Hicks Company, is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Nevada, and as such lawfully doing business in the State of Oregon.

## III.

That the Sullivan Fireproof Partition Co. is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Washington, and as such lawfully doing business in the State of Oregon.

## IV.

That School District No. 1 of Multnomah County, Oregon, is a municipal corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon.

## V.

That the Pacific Coast Casualty Co. is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of California, and as such lawfully doing business in the State of Oregon.

## VI.

That on or about the ..... day of January, 1911,

the defendant, Lewis A. Hicks Company, entered into an agreement with School District No. 1 of Multnomah County, Oregon, for the construction of a school building known as the new Lincoln High School in the City of Portland, County of Multnomah, State of Oregon, and that upon the demand of said School District No. 1 and in compliance with the laws of the State of Oregon, as set forth in Paragraph 6266 of Lord's Oregon Laws, the defendant, Lewis A. Hicks Company, in connection with said contract, executed its bond as principal in favor of said School District No. 1, with the Pacific Coast Casualty Co. as surety thereon, of which bond the following is a copy:

“KNOW ALL MEN BY THESE PRESENTS: That we, Lewis A. Hicks Co., as Principal, and Pacific Coast Casualty Company, a corporation organized and existing under and by virtue of the Laws of the State of California, and authorized and empowered under the laws of the State of Oregon to become surety on bonds and undertakings in the State of Oregon, as surety, are held and firmly bound unto School District No. 1 of Multnomah County, Oregon, of Portland, Oregon, in the penal sum of One Hundred Sixty Thousand (\$160,000.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of January, A. D. 1911.

The condition of the above obligation is such that, whereas, the above bounden principal, Lewis A. Hicks Co., did on the ..... day of January, 1911, enter into a contract with the said School District No. 1 of Multnomah County, Oregon, to furnish all the materials and perform all the work for the complete construction, with the exception of the heating and ventilation, plumbing, electric wiring and fixtures, finishing hardware, plastering, painting, glazing and linoleum flooring of the whole basement and part of building above first floor shown on plans between Market, Mill, Park Streets and Red Line of the New Lincoln High School, as called for in contract, all to be shown on the drawings and described in the specifications prepared by Whitehouse & Fouilhoux, Architects, which drawings, specifications and contracts are referred to and made a part hereof as fully as if set forth at length herein.

NOW, THEREFORE, if the said contractor shall well and faithfully perform all the covenants, conditions and provisions in said contract, plans and specifications, and shall pay all claims or liens for labor, work and material on account of all sub-contractors, material men, laborers and mechanics furnishing labor or material under said contract and all claims for damages against the owner on account of personal injury to any persons working on or about said structure, then this obligation shall be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, said Principal and



Surety have caused these presents to be signed by duly authorized officers, and the corporate seals to be attached hereto, this 20th day of January, A. D. 1911.

LEWIS A. HICKS CO.

By Lewis A. Hicks, President.

Amounts correct,

(Sg.) R. H. Thomas, Clerk.

PACIFIC COAST CASUALTY COMPANY,

By Marshall A. Frank, Attorney in Fact.

Form approved:

(Sg.) J. V. Beach,

H. C. Campbell,

Judiciary Committee.

## VII.

That thereafter and on or about the 29th day of April, 1911, the defendant entered into a contract with J. D. Sullivan, as sub-contractor, in the matter of the construction of a portion of said new Lincoln High School Building, wherein and whereby the said J. D. Sullivan contracted to furnish the necessary labor and material for the construction of the part of the building so contracted by him to be constructed, and that afterward and on or about the 3rd day of November, 1911, the said J. D. Sullivan duly assigned to said Sullivan Fireproof Partition Co., all of his interest in his said contract, and that thereafter the said Sullivan Fireproof Partition Co. was recognized as a sub-contractor under said contract by the defendant, and as the other party to said contract, and said Sullivan Fireproof Partition Co. entered upon the per-

formance of the work specified in said contract, and accepted the terms and conditions thereof.

### VIII.

That the said Sullivan Fireproof Partition Co. in said contract agreed to pay promptly, as they became due, all sums incurred for any work or labor done, or materials furnished, upon said building in connection with said contract, and that said contract provides that in case of any default on the part of the Sullivan Fireproof Partition Co. to pay any such sums, the defendant shall have the right to pay such sums, together with any additional sums the payment of which is necessitated by such default of said Sullivan Fireproof Partition Co., either for costs, Attorneys fees, or otherwise, and that all sums so paid by the defendant should be repaid by the said Sullivan Fireproof Partition Co., and that the defendant might with-hold any money due the Sullivan Fireproof Partition Co. until such indebtedness is repaid.

### IX.

That on the 18th day of December, 1911, the said Sullivan Fireproof Partition Co. gave an order upon defendant in favor of plaintiff, of which the following is a copy, being the same order set forth in Paragraph VI of plaintiff's complaint, to-wit:

Portland, Ore., Dec. 18, 1911.

Lewis A. Hicks Company,

Worcester Bldg., City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all

monies now due and all that may become due on that certain contract between yourselves and the undersigned for the partition work in the new Lincoln High School in this City.

This order is meant to cover only as to payments and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,

SULLIVAN FIREPROOF PARTITION CO.

J. D. Sullivan, Pres.

A. C. Sullivan, V. Pres.

and Sec'y.

Accepted,

LEWIS A. HICKS COMPANY,

by George Wagner, Mgr.

X.

That the plaintiff received said order from said Sullivan Fireproof Partition Co. with full knowledge of the obligation of the said Sullivan Fireproof Partition Co. to defendant to pay all sums incurred for all work or labor done, or materials furnished in connection with said contract, and that said order was given, as shown upon its face, subject to the condition that it was so given subject to the payment by said Sullivan Fireproof Partition Co. for all work or labor done, or materials furnished upon said building in connection with said contract, and that said order itself gave notice to plaintiff of all the terms and conditions of said contract, and that the same was received by plaintiff subject to all the conditions thereof.

## XI.

That thereafter the Sullivan Fireproof Partition Co. entered upon the performance of the work specified in its said contract with defendant, and thereafter completed the same, and that the defendant has paid, by and with the consent and through the medium of the plaintiff, Ladd & Tilton Bank, the full amount of contract price and extras provided for in said contract, excepting the sum of Thirty-five Hundred (\$3500.00) Dollars, and that on the 16th day of May, 1912, there was unpaid, account of said contract, by defendant, the sum of Thirty-five Hundred (\$3500.00) Dollars.

## XII.

That thereafter, and on or about the ..... day of May, 1912, defendant was served with a garnishment in an action brought by Roebblings Sons Co. against the Sullivan Fireproof Partition Co. in the Justice's Court for the District of Portland, County of Multnomah, State of Oregon, wherein the sum of Two Hundred Fourteen and Ninety-nine Hundredths (\$214.99) Dollars was garnished in the hands of defendant as being due and owing to the Sullivan Fireproof Partition Co., and that thereafter a judgment was duly made and entered in said Justice's Court against said Sullivan Fireproof Partition Co. in said amount and against defendant, and that the defendant thereupon paid said sum in satisfaction of said judgment; that the claim of said Roebblings Sons Co. which culminated in said judgment, grew out of the

furnishing of materials to said Sullivan Fireproof Partition Co. in connection with the contract of said Sullivan Fireproof Partition Co. with defendant, and that there remains at this time unpaid by defendant, account of said contract with said Sullivan Fireproof Partition Co., the sum of Three Thousand Two Hundred Seventy-seven and Ninety-six Hundredths (\$3,277.96) Dollars.

### XIII.

That the following named persons and corporations performed labor and furnished materials to the Sullivan Fireproof Partition Co. to be used and which was used in the matter of the partial construction of said building by said Sullivan Fireproof Partition Co. under and by virtue of its contract with defendant, and that there is now unpaid and owing to the said persons and corporations by the said Sullivan Fireproof Partition Co., on account thereof, the amounts set opposite their respective names, to-wit:

Acme Cement Plaster Co. ....	\$ 836.55
Atlas Mixed Mortar Co. ....	121.30
Portland Quarry Co. ....	134.00
Columbia Contract Co. ....	114.08
Columbia Hardware Co. ....	30.22
East Side Transfer Co. ....	75.65
E. Hippeley .....	32.35
Northwest Door Co. ....	51.05
Oregon Transfer Co. ....	72.75
Portland Machinery Co. ....	47.85



Portland Railway, Light and Power Co. ....	52.90
George B. Rate .....	13.75
Union Oil Company .....	78.25
Western Lime & Plaster Co. ....	1285.91
Wright and Branch .....	1400.00
United States Steel Product Co.....	150.00

making a total of Four Thousand Four Hundred  
Ninety-six and Sixty-one Hundredths (\$4,496.61)  
Dollars.

#### XIV.

That the Sullivan Fireproof Partition Co. is insolvent, and is unable to pay to said persons and corporations the said amount of Four Thousand Four Hundred Ninety-six and Sixty-one Hundredths (\$4,496.61) Dollars, or any part thereof, and that the said persons and corporations are claiming from the defendant under its bond so executed to School District No. 1 of Multnomah County, Oregon, the said aggregate sum of Four Thousand Four Hundred Ninety-six and Sixty-one Hundredths (\$4,496.61) Dollars, and that a portion of said corporations have already instituted an action against the defendant upon said bond and that defendant is liable for and will be compelled to pay to said persons and corporations the said sum of \$4,496.61.

#### XV.

That owing to the failure of said Sullivan Fireproof Partition Co. to pay to said persons and corporations the said sum of Four Thousand Four Hundred Ninety-six and Sixty-one Hundredths (\$4,496.61) Dollars,

the defendant has paid all moneys due, or to become due, to said Sullivan Fireproof Partition Co., and that there was not at the commencement of the above entitled action, nor is there now anything due, owing or payable by the defendant to said Sullivan Fireproof Partition Co., and that consequently there is nothing due, owing or payable from defendant to plaintiff by virtue of said order.

WHEREFORE, defendant prays for a judgment of the above entitled court, dismissing the above entitled action, and for a judgment against plaintiff for its costs and disbursements herein.

CHAMBERLAIN, THOMAS & KRAEMER,  
and LESTER W. HUMPHREYS,

Attorneys for Defendant.

[Endorsed]: Answer. Filed Sept. 14, 1912.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 14 day of December, 1912, there was duly filed in said Court, a Second Amended Reply, in words and figures as follows, to wit:

**[Second Amended Reply.]**

(Title.)

Comes now the above named plaintiff and for a second amended reply to the answer filed by the above named defendant, denies, admits and alleges as follows:

I.

For a reply unto paragraph I of the further and

separate answer and defense plaintiff admits the same.

## II.

For a reply unto paragraph II of the further and separate answer and defense plaintiff admits the same.

## III.

For a reply unto paragraph III of the further and separate answer and defense plaintiff admits the same.

## IV.

For a reply unto paragraph IV of the further and separate answer and defense plaintiff admits the same.

## V.

For a reply unto paragraph V of the further and separate answer and defense plaintiff admits the same.

## VI.

For a reply unto paragraph VI of the further and separate answer and defense plaintiff admits that the defendant entered into an agreement with School District No. 1 of Multnomah County, Oregon, for the construction of a High School Building to be known as the New Lincoln High School, and admits that in connection with said contract the above named defendant executed its bond as principal in favor of said School District No. 1, with the Pacific Coast Casualty Company as surety thereon, but denies any knowledge or information as to whether or not the bond

set forth in said Paragraph VI is a true copy of said bond and the whole thereof, and denies any knowledge or information as to whether or not said bond was executed pursuant to the laws of the State of Oregon as required by Section 6266 of Lord's Oregon Code or of any other section of said Code.

#### VII.

For a reply unto paragraph VII of the further and separate answer and defense plaintiff admits that on or about the 29th day of April, 1911, the defendant entered into a contract with J. D. Sullivan as sub-contractor, for the construction of a portion of the New Lincoln High School, and admits that said contract was, on or about the 3rd day of November, 1911, duly assigned to the Sullivan Fireproof Partition Co., and admits that the Sullivan Fireproof Partition Co. entered upon the performance of the work specified in said contract, but denies any knowledge or information sufficient to form a belief as to the other allegations in said paragraph of said further and separate answer set forth.

#### VIII.

For a reply unto paragraph VIII of the further and separate answer and defense plaintiff denies any knowledge or information sufficient to form a belief as to the allegations thereof and therefore denies the same.

#### IX.

For a reply unto paragraph IX of the further and separate answer and defense plaintiff admits the same.

## X.

For a reply unto paragraph X of the further and separate answer and defense plaintiff denies the same.

## XI.

For a reply unto paragraph XI of the further and separate answer and defense plaintiff denies that the defendant, by the consent and through the medium of Ladd & Tilton Bank, has paid all of the money due under the said contract entered into with the Sullivan Fireproof Partition Co. excepting the sum of thirty-five hundred dollars (\$3500.) and this plaintiff denies that the sum of thirty-five hundred dollars was, on the 16th day of May, 1912, the balance due and remaining unpaid on account of said contract.

## XII.

For a reply unto paragraph XII of the further and separate answer and defense plaintiff denies any knowledge or information sufficient to form a belief as to the facts therein alleged and therefore denies the same.

## XIII.

For a reply unto paragraph XIII of the further and separate answer and defense plaintiff denies any knowledge or information sufficient to form a belief as to the facts therein alleged and therefore denies the same.

## XIV.

For a reply unto paragraph XIV of the further and separate answer and defense plaintiff denies any knowledge or information sufficient to form a belief



as to the facts therein alleged and therefore denies the same.

XV.

For a reply unto paragraph XV of the further and separate answer and defense plaintiff denies the same.

And for a further and separate reply unto the answer filed by the defendant herein and by way of estoppel, this plaintiff alleges as follows:

I.

Plaintiff refers to its complaint filed herein and refers to each and all of the allegations thereof and makes the same a part of this further and separate reply.

II.

That at the time the Sullivan Fireproof Partition Co. borrowed money from the plaintiff herein as set forth in the complaint filed herein, the Sullivan Fireproof Partition Co. made, executed and delivered, for a valuable consideration, unto Ladd & Tilton Bank, an assignment of all the funds due and owing or to become due and owing to it on account of said contract from Lewis A. Hicks Company, which said assignment is in words and figures as follows, to wit:

“Portland, Ore., Dec. 18, 1911.

Lewis A. Hicks Company,

Worcester Bldg., City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all monies now due and all that may become due on that certain contract between yourselves and the under-

signed for the partition work in the New Lincoln High School in this city. This order is meant to cover only as to payments and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,

SULLIVAN FIREPROOF PARTITION CO.

J. D. SULLIVAN, Pres.

A. C. SULLIVAN, V. Pres.

and Sec'y.

Accepted,

LEWIS A. HICKS COMPANY

By George Wagner."

which said assignment was duly accepted by the Lewis A. Hicks Company, and pursuant to the terms thereof said Lewis A. Hicks Company did thereafter pay unto the Ladd & Tilton Bank, as assignee, all the money due under and by virtue of said contract and assignment as aforesaid, save and except thirty-six hundred dollars (\$3600.) as in said complaint set forth.

### III.

That heretofore and on or about April 3, 1912, Lewis A. Hicks Company made and delivered the following notice:

"Apr. 3rd, 1912.

Sullivan Fireproof Partition Co.,  
City.

Gentlemen:

As your work has been completed on the Lincoln

High School there will be due you on or about May 1st the balance of \$4300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,

LEWIS A. HICKS COMPANY.

FK:KT

By Fred A. Katz."

That said notification of April 3, 1912, as above set forth, was made and given by the Lewis A. Hicks Company after and subsequent to the time when the Sullivan Fireproof Partition Co. had performed and completed its said contract with the Lewis A. Hicks Company as aforesaid, and after the work done under the said contract as aforesaid had been accepted by the Lewis A. Hicks Company, and after all the money due under said contract aforesaid was due and owing from Lewis A. Hicks Company by virtue thereof; that said notification bearing date of on or about April 3, 1912, was made and given by the Lewis A. Hicks Company with full knowledge, or with opportunity of full knowledge, of all the facts relative to said assignment, notice, sub-contract and the work done and acceptance thereof, and was made and given by the said Lewis A. Hicks Company with the intention that the same should be relied upon by the Sullivan Fireproof Partition Co. and the Ladd & Tilton Bank. That Ladd & Tilton Bank, relying upon the assign-

ment aforesaid, dated December 18, 1911, and notification aforesaid made and given April 3, 1912, and relying upon the representations made by Lewis A. Hicks Company that the said contract had been completed and the work done thereunder accepted, and relying upon the notification, representations and statements of Lewis A. Hicks Company that there was forty-three hundred dollars (\$4300.) due Sullivan Fireproof Partition Co. and this plaintiff by virtue of the assignment aforesaid, and relying upon the assignment, notification of April 3, 1912 aforesaid, representations and statements of Lewis A. Hicks Company that said contract aforesaid had been completed and the work thereunder accepted according to the terms thereof, said Ladd & Tilton Bank did, relying upon all the statements aforesaid, release unto its own prejudice to Sullivan Fireproof Partition Co. all moneys which came into its possession, which said moneys had been paid to Ladd & Tilton Bank by the Lewis A. Hicks Company by virtue of the assignment aforesaid, the said Ladd & Tilton Bank relying upon the last moneys due and payable under said contract to reimburse itself for the loans made to Sullivan Fireproof Partition Co. And if it had not been for the assignment, and notification dated April 3, 1912, and the statements and representations made by the Lewis A. Hicks Company, all as aforesaid, the said Ladd & Tilton Bank would not have released all of said funds which came into its possession as aforesaid, but would have applied the same, as it had a

right to do, on account of the indebtedness due to itself from the Sullivan Fireproof Partition Co. That Ladd & Tilton Bank relied upon the written notice above referred to and the statements and representations therein contained and believed therefrom that the Sullivan Fireproof Partition Co. had fully completed the contract aforesaid and that the work had been accepted thereunder and believed that the full sum of \$4300. was due on account thereof and that the same would be paid forthwith by Lewis A. Hicks Company, and if it had not been for the assignment and notification above set forth Ladd & Tilton Bank would not have released to Sullivan Fireproof Partition Co. all the funds which came into its hands and belonging to Sullivan Fireproof Partition Co. in excess of the indebtedness due and owing to it from the Sullivan Fireproof Partition Co. The said Ladd & Tilton Bank did, after receiving the notification of April 3, 1912, above set out, and in reliance thereon pay unto Sullivan Fireproof Partition Co. the full sum of seven hundred dollars (\$700.) the said sum being the difference between the amount which the Lewis A. Hicks Company specified in said notice as being the balance due under said contract and which it would pay and the amount of the indebtedness due from Sullivan Fireproof Partition Co. to Ladd & Tilton Bank on that date.

#### IV.

That on April 3, 1912, the indebtedness due and owing from the Sullivan Fireproof Partition Co. to



Ladd & Tilton Bank was overdue and the said Sullivan Fireproof Partition Co. was at that time a going concern and actively engaged in business within the State of Oregon, and the said Ladd & Tilton Bank could have adopted such means and taken such steps as were proper and necessary to secure the repayment of the said indebtedness and could have applied the money then in its possession or which afterwards came into its possession by virtue of said assignment on said indebtedness, but on the contrary the said Ladd & Tilton Bank, believing the statements and representations of Lewis A. Hicks Company to be true and the written notices given thereunder to be true, and further believing and relying upon the fact that the full sum due on account of the contract would be paid to it by virtue of said assignment aforesaid did not so apply said money or adopt such means or measures to secure the payment of said indebtedness due from Sullivan Fireproof Partition Co. to itself, which application of money or means and measures if adopted would have caused reimbursement to the above named plaintiff for the loans so made to the Sullivan Fireproof Partition Co. That subsequently the Sullivan Fireproof Partition Co. became unable to make payment of its outstanding indebtedness and withdrew from active business in the State of Oregon, and this plaintiff, because of the acts and facts aforesaid, is now deprived of any recourse against said Sullivan Fireproof Partition Co. on account of the indebtedness aforesaid.

## V.

That because of the facts herein stated Ladd & Tilton Bank was lulled into a position of false security and was prevented from taking such steps as would have been necessary and proper to enforce and collect the indebtedness due from Sullivan Fireproof Partition Co. to itself at a time when the collection of said indebtedness could have been enforced, and because of such facts as herein stated the said Ladd & Tilton Bank changed its position, all to its subsequent detriment as herein set forth.

## VI.

That heretofore the Lewis A. Hicks Company has elected to pay unto Ladd & Tilton Bank the balance due as aforesaid, and which remained unpaid, by virtue of its contract with the Sullivan Fireproof partition Co., the assignment of the funds thereunder and notification subsequent thereon, all as is herein more particularly set forth, which election on the part of the Lewis A. Hicks Company was made with full knowledge, or with opportunity of full knowledge, of all the facts, circumstances and conditions surrounding the contract entered into between Lewis A. Hicks Company and the Sullivan Fireproof Partition Co. and the performance of the work thereunder and the fulfillment of the terms and conditions thereof and the assignment of the moneys accruing thereon.

## VII.

That Lewis A. Hicks Company is not liable to any of the unpaid creditors of the Sullivan Fireproof Par-

tion Co. for any money which may be due to said unpaid creditors on account of any of the work done on the said New Lincoln High School, inasmuch as the said Lewis A. Hicks Company, prior to the commencement of operations under said contract between said Lewis A. Hicks Company and said Sullivan Fireproof Partition Co. exacted from the Sullivan Fireproof Partition Co. a bond with good and sufficient surety thereon, which bond was conditioned to secure the faithful performance of said contract on the part of the Sullivan Fireproof Partition Co. and particularly the said bond was given to indemnify and save harmless the said Lewis A. Hicks Company against all and any unpaid creditors of the said Sullivan Fireproof Partition Co. on account of any work done on the New Lincoln High School, which bond was in the penal sum of six thousand dollars (\$6000.) and is in words and figures as follows, to wit:

“BOND NO. 43981

UNITED STATES FIDELITY AND GUAR-  
ANTY COMPANY.

Home Office, Baltimore, Md.

KNOW ALL MEN BY THESE PRESENTS:  
That Sullivan Fireproof Partition Co. a corporation organized under the laws of the State of Washington (hereinafter called the Principal) and the United States Fidelity and Guaranty Company, a corporation created and existing under the laws of the State of Maryland, and whose principal office is located in Baltimore City, Maryland, (hereinafter called the

Surety) are held and firmly bound unto LEWIS A. HICKS COMPANY, a corporation, (hereinafter called the Obligee) in the full and just sum of Six Thousand and no-100 (\$6,000.00) Dollars, lawful money of the United States, to the payment of which sum, well and truly to be made, the said Principal binds itself, its successors and assigns, and the said Surety binds itself, its successors and assigns, jointly and severally, firmly by these presents, signed, sealed and delivered this 3rd day of November, A. D. 1911.

WHEREAS, said Principal has entered into a certain written contract with the Obligee, which contract was originally executed April 19th, 1911, between J. D. Sullivan, of Salt Lake Utah, and Lewis A. Hicks Company, and assigned to said principal on the 3rd day of November, 1911, wherein it is agreed to do and perform all the work for the plaster block partitions, inclusive of the furnishings and setting of all approved partition blocks with grounds, nailing blocks and backboards required for the fastening of lime or other materials attaching to the partitions, but exclusive of bucks for all openings to be supplied and set by the contractor at his own expense, on and in connection with a Brick and Steel High School Building, at Portland, Oregon, on Block 202, bounded by Mill, Market, Seventh and Park Streets. It is, however, expressly understood and agreed that this bond guarantees the completion of the contract in accordance with its terms and conditions, but is not intended and does not guarantee against damages for

personal injury or infringement of patents, as more specifically referred to in Sections VIII and IX of said contract.

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said Principal shall well and truly indemnify and save harmless the said Obligee from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of the said Principal to be performed, then this obligation shall be void; otherwise to remain in full force and effect in law provided, however, that this bond is issued subject to the following conditions and provisions:

FIRST: That no liability shall attach to the Surety hereunder unless, in the event of any default on the part of the principal in the performance of any of the terms, covenants or conditions of the said contract, the Obligee shall promptly upon knowledge thereof, and in any event not later than thirty days after the occurrence of such default, deliver to the Surety at its office in the City of Portland, Oregon, written notice thereof with a statement of the principal facts showing such default and the date thereof; nor unless the said Obligee shall deliver written notice to the Surety at its office aforesaid, and the consent of the Surety thereto obtained, before making to the Principal the final payment provided for under the contract herein referred to.

SECOND: That in case of such default on the part of the Principal, the Surety shall have the right,



if it so desire, to assume and complete or procure the completion of said contract; and in case of such default, the Surety shall be subrogated and entitled to all the rights and properties of the Principal arising out of the said contract and otherwise, including all securities and indemnities theretofore received by the Obligee, and all deferred payments, retained percentages and credits due to the Principal at the time of such default, or to become due thereafter by the terms and dates of the contract.

THIRD: That in no event shall the Surety be liable for a greater sum than the penalty of this Bond, or subject to any suit, action or other proceeding thereon that is instituted later than the 3rd day of November A. D. 1912.

FOURTH: That in no event shall the Surety be liable for any damage resulting from, or for the construction or repair of any work damaged or destroyed by any act of God, or the public enemies, or mobs, or riots, or civil commotion, or by employes leaving the work being done under said contract, on account of so-called "strikes" or labor difficulties.

IN TESTIMONY WHEREOF, the said principal has caused these presents to be sealed with its corporate seal, attested by the signature of its duly authorized officers, and the said surety has caused these presents to be executed by its Attorney-in-fact, sealed with its corporate seal, the day and year first above written.

SULLIVAN FIREPROOF PARTITION CO.

By A. C. Sullivan, Secretary.

Attest: J. D. Sullivan, President.

By A. C. Sullivan, His Atty. in fact.

THE UNITED STATES FIDELITY AND  
GUARANTY CO.

By Douglas R. Tate, Attorney in Fact."

Countersigned by

Hartman & Thompson,

General Agents.

VIII.

That said bond was properly executed and was a good and sufficient bond and was so accepted by the Lewis A. Hicks Company and the said bond is now and has been at all times herein stated in full force and effect and binding upon each the principal and surety therein named, according to the terms thereof, and because of said bond the said Lewis A. Hicks Company will have or sustain no loss on account of any of the unpaid creditors of said Sullivan Fireproof Partition Co. for work done on the New Lincoln High School, and the said Lewis A. Hicks Company, because of said bond, has ample and sufficient security to indemnify it against all loss on account thereof.

IX.

That the said Ladd & Tilton Bank has no security for indemnity for the repayment of the money due from the Sullivan Fireproof Partition Co. other than as is herein set out and which arises by virtue of the assignment of December 18, 1911, and the notification of April 3, 1912.

## X.

That because of all the facts in the complaint and further reply set forth the Lewis A. Hicks Company ought to be and is now estopped to deny that the full sum of thirty-six hundred dollars (\$3600.) is not now due to said Sullivan Fireproof Partition Co. and Ladd & Tilton Bank, its assignee, all as aforesaid.

## XI.

That by reason of the acts, facts, deeds, writings and other matters herein set forth and contained in the pleadings on file herein the Lewis A. Hicks Company has lulled the said Ladd & Tilton Bank into a position of false security and caused it to change its position and release moneys in its possession or which came into its possession and which belonged to the Sullivan Fireproof Partition Co. and with which Ladd & Tilton Bank could have reimbursed itself on account of said loans, and has prevented it from enforcing the collection of its indebtedness against the Sullivan Fireproof Partition Co. at the time when the said Sullivan Fireproof Partition Co. was a going concern and able to pay the same, and the said Lewis A. Hicks Company ought to be and is estopped from asserting that there is no money due to the Sullivan Fireproof Partition Co. or this plaintiff by virtue of the assignment and notification and other facts as above set forth.

WHEREFORE, plaintiff asks judgment as prayed for in the complaint.

WOOD, MONTAGUE & HUNT,  
Attorneys for Plaintiff.

[Endorsed]: Second Amended Reply. Filed Dec. 14, 1912.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 10 day of March, 1913,  
there was duly filed in said Court, an Opinion, in  
words and figures as follows, to wit:

[Opinion.]

(Title.)

BEAN, District Judge.

The facts material to this controversy are that in January, 1911, the defendant Hicks & Company, a corporation, entered into a contract with School District No. 1, Multnomah County, Oregon, to furnish material and labor necessary for the erection and construction of a public school building and as required by section 6266 L. O. L., executed and delivered to the District a bond with approved surety, conditioned that it would promptly make payments to all persons supplying labor or material for any portion of the work provided in the contract. Thereafter and in April, 1911, Hicks & Company sublet a portion of the work to one J. D. Sullivan, and by the terms of the written contract between it and Sullivan, Sullivan agreed to pay promptly as they became due all sums for work and labor done or material furnished in the doing of the work specified therein "and in case of any default on the part of the sub-contractor (Sullivan) the contractor (Hicks & Co.) shall have the

right to pay said sums together with any additional sums the payment of which is necessitated by such default of the sub-contractor, either for costs, attorneys fees or otherwise, and all sums so paid by the contractor shall be repaid by the sub-contractor, and the contractor may withhold any money due the sub-contractor until such indebtedness is repaid."

Sullivan thereafter assigned his contract, with the consent of Hicks & Company, to the Sullivan Fireproof Partition Company and such company, for the purpose of obtaining a banking credit with the plaintiff, made, executed and delivered to it on December 18, 1911, the following order:

"Portland, Ore., Dec. 18, 1911.

"Lewis A. Hicks Company,  
Worcester Building,  
City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all monies now due and all that may become due on that certain contract between yourselves and the undersigned for the partition work in the new Lincoln High School in this city.

This order is meant to cover only as to payment and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,

Sullivan Fireproof Partition Co.

J. D. Sullivan, Pres.

A. C. Sullivan, V. Pres.

& Sec'y."



This order was duly accepted in writing by Hicks & Company. Thereafter the Sullivan Fireproof Partition Company proceeded with the execution of its contract and payments thereon from time to time by Hicks & Company were made by its checks in favor of the plaintiff, which checks were endorsed by the plaintiff without recourse and delivered to the Sullivan Company and passed to its credit on the books of the bank. The contract of the Sullivan Company was completed some time in March, 1912. At that time there was due the plaintiff from the Sullivan Company about \$3600.00 for money advanced on the security of the order or assignment of December 18, 1911, and there was also a balance of about \$4300.00 unpaid on the contract between Hicks & Company and the Sullivan Company. The Sullivan Company desired to use \$700.00 of the latter amount in payment of sundry small claims against it, but the plaintiff declined to consent thereto without a written statement from Hicks & Company showing the condition of the account between it and the Sullivan Company. Thereupon Hicks & Company gave the Sullivan Company for delivery to plaintiff the following statement or letter:

"April 3rd, 1912.

"Sullivan Fireproof Partition Company,  
City.

Gentlemen:

As your work has been completed on the Lincoln High School there will be due you on or about May 1st

the balance of \$4300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,  
LEWIS A. HICKS COMPANY.  
By Fred A. Katz."

This statement or letter was delivered by the Sullivan Company to the plaintiff and thereupon Hicks & Company drew its check for \$700.00 in favor of the plaintiff, which check was endorsed by it and delivered to the Sullivan Company and by it used in payment of its debts.

At the time the letter of April 3rd was written and the \$700.00 check drawn there were and are now unpaid claims for labor and material furnished the Sullivan Company and used by it in the performance of its contract with Hicks & Company, amounting to about \$4500.00, which Hicks & Company admit its liability to pay, and on account thereof Hicks & Company in May, 1912, refused to make any further payments to the plaintiff on the assignment of December, 1910, and hence this action.

Under the bond of Hicks & Company to the School District it and its surety became liable for the payment of labor and material furnished to sub-contractors and which were used in the construction of the building, and to an action in the name of the state

for the use and benefit of the labor and material claimants. (Sec. 6266 L. O. L. Hill vs. American Surety Co., 200 U. S. 197. Smith vs. Mosier, 169 Fed. 430.) The order and assignment from the Sullivan Company to the plaintiff was subject and subordinate to the terms of the contract between it and the defendant and their respective rights and liabilities thereunder. The plaintiff therefore knew or was chargeable with knowledge at the time it accepted the order and assignment and made advances thereunder that Hicks & Company was liable for the payment of claims for labor and material furnished the Sullivan Company in the performance of its contract.

The contention is made on behalf of the plaintiff (1) that Hicks & Company cannot assert as a defense to this action is liability for unpaid labor and material furnished the Sullivan Company until it has paid and discharged them. And (2) that its liability under its bond is for such claims only as could be made the basis of a mechanic's lien if such lien could be filed against a public building.

I am unable to concur in the first position and it is unnecessary to consider the other for, without detailing the evidence, it clearly shows that the unpaid material and labor claims for which liens could have been filed amount in the aggregate to more than the sum now claimed by the plaintiff. The statute (Sec. 6266) in pursuance of which Hicks & Company's bond was given provides that any person furnishing labor or supplying material for the construction of the build-

ing specified in the contract and bond may, when payment for the same has not been made, have a right of action and is authorized to bring suit in the name of the state for his use and benefit against the contractor and surety, and to prosecute the same to final judgment and execution. Hicks & Company and its surety were therefore personally liable for unpaid labor and material claims of the Sullivan Company. The fact that such claims are still unpaid would be a good defense to an action by the Sullivan Company to recover on its contract, and the plaintiff stands in the place and stead of the latter, it is a proper defense to this action.

The principal contention of the plaintiff is that the defendant is estopped by its letter of April 3, 1912, from now asserting that there is not due and owing from it to the Sullivan Company the amount stated therein less the \$700.00. Assuming but not deciding that the letter amounted to a declaration by Hicks & Company that the sum of \$4300.00 was then due and payable to the Sullivan Company and that such sum would be paid the plaintiff in any event, and not a mere declaration that there was such a balance unpaid on the contract with the Sullivan Company, and assuming further that the plaintiff so understood it and relied thereon, there is no room for an application of the doctrine of estoppel because the undisputed facts show that the plaintiff was not thereby misled to its injury. It was no doubt lulled into inaction and in reliance thereon took no steps at the time to

enforce its claim against the Sullivan Company, but the undisputed evidence is that the Sullivan Company was in no worse position financially in May, when the defendant refused to make the payment than it was when the letter was written. The theory of an estoppel in pais is that one who by his acts or conduct has misled another to believe a given state of fact to be true and to act thereon, shall not be permitted to assert the contrary to the injury of the person so acting. The important condition of the right to assert such estoppel is the fact in addition to all others that the party pleading it must show that the attempted repudiation will work him injury by causing him to suffer a loss of some substantial character or that he was thereby induced to alter his position for the worse in some material respect. (16 Cyc. 744; *Dickerson vs. Colgrove*, 100 U. S. 578.) Plaintiff was in no way injured by its delay in proceeding against the Sullivan Company, but its remedy against that company was as full and complete in May, when the defendant refused payment, as it was when the letter of April 3rd was written. It was not injured on account of the \$700.00 payment because it was made to pay claims which could have been asserted against it by the defendant, and moreover, it could not rightfully have applied such payment to its own account because it was made on the express understanding of all parties that it was to go to the discharge of labor and material claims.

Plaintiff claims that the defendant is protected by



a bond which it received from the Sullivan Company at the time the sub-contract was entered into and that it has commenced a suit to enforce such bond. The bond was to indemnify the defendant for claims for labor and material and the payment to plaintiff would not be covered thereby.

[Endorsed]: Opinion. Filed Mar. 10, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 10 day of March, 1913, the same being the 7th judicial day of the Regular March, 1913, Term of said Court; Present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

**[Judgment Entry.]**

(Title.)

This cause having heretofore been duly tried by the court, a jury having been waived, upon the admissions in the pleadings and evidence produced in open court, the plaintiff appearing by Isaac D. Hunt of its attorneys and the defendant appearing in Warren E. Thomas and Lester W. Humphreys of its attorneys, and the court at said time not being fully advised in the premises and having taken the matter under advisement and being now fully advised therein, and the court does hereby generally find in favor of the defendant and against the plaintiff, and does hereby make a general finding that the plaintiff take

nothing in the above entitled action, and that the same be dismissed and that the defendant have judgment against the plaintiff for the costs and disbursements of this action.

NOW, THEREFORE, based thereon, it is ordered and adjudged that there is nothing due or payable from the defendant to the plaintiff in the above entitled action, and that plaintiff take nothing thereunder, and that said action be and the same is hereby dismissed, and that the defendant have and recover of and from the plaintiff its costs and disbursements of this action taxed at \$33.40, and that execution do issue therefor.

And afterwards, to wit, on the 29 day of May, 1913, there was duly filed in said Court, a Bill of Exceptions, in words and figures as follows, to wit:

**[Bill of Exceptions.]**

(Title.)

Now comes the plaintiff herein, Ladd & Tilton Bank, a corporation, by Wood, Montague & Hunt, its attorneys, and presents this its bill of exceptions as follows:

This cause came on to be heard on the 24th day of February 1913, before the Honorable R. S. Bean, Judge of the United States District Court for the District of Oregon, sitting at Portland, Oregon, without a jury, a jury having been waived ~~in writing~~ by all the parties, the plaintiff appearing by Isaac D. Hunt of counsel for the plaintiff, and the defendant appear-

ing by Warren E. Thomas and Lester W. Humphreys, of counsel for the defendant, all parties having announced themselves ready for trial the following proceedings were had and testimony given.

Mr. A. C. SULLIVAN, a witness called on behalf of the plaintiff, after being duly sworn, testified, among other things, on cross examination, as follows:

Questions by Mr. THOMAS:

Q. Do you remember, Mr. Sullivan, how the amount of the unpaid claims of the various materialmen furnishing stuff to you upon this building is—what the amount is?

A. Somewhere about \$4500.00.

Q. About \$4500.00. Have you, Mr. Sullivan, your books here indicating the amounts that are due to the various claimants?

A. Yes.

Q. I will ask you to produce them. (Witness gets books.) What book is that you have, Mr. Sullivan?

A. I call it a ledger.

Q. Call it a ledger. Who made the entries in that book?

A. I did.

Q. So that the entries therein are from your own personal knowledge?

A. Yes, sir.

Q. And they were not entered by anybody else?

A. No, sir.

Q. Is there anything in there, Mr. Sullivan, in con-

nection with the claim of Roebling's Sons Company against the Sullivan Fireproof Partition Company?

A. Yes, sir.

Q. Will you state what the Roeblings' Sons Company furnished to you, if anything, that caused that charge to be put in that book?

To which question the plaintiff objected on the ground that the same was not proper cross examination and was incompetent, irrelevant and immaterial and not pertinent to any issues made by the pleadings.

The court sustained the objection upon the ground that the same was not proper cross examination and thereafter counsel for the defendant made Mr. Sullivan his own witness and continued as direct examination.

Questions by Mr. THOMAS:

Q. What were the things that Roebling & Sons' Company furnished you in connection?

A. There was reinforcing wire.

Thereupon the plaintiff objected to the question and answer and further objected to the testimony which was being elicited from the witness and objected to the continuation thereof upon the ground and for the reason that the same was incompetent, irrelevant and immaterial and not pertinent to any issues made by the pleadings in this case, which objection was then and there overruled by the court, to which ruling the plaintiff then and there excepted,

which exception was then and there duly allowed by the court.

Questions by Mr. THOMAS continued.

Q. Now what did you say that stuff was that Roebling & Sons' Company furnished?

A. It was reinforcing wire.

Q. Where was that used?

A. It was used in making these blocks.

Q. Blocks for what?

A. Partition blocks.

Q. Partition blocks. Where were the partition blocks used?

A. In the partition work at the Lincoln High School, and other places as well.

Q. What was the amount of the claim of Roebling & Sons?

A. It totaled \$214.99.

Q. Has that claim been paid?

A. Yes, sir.

Q. Who paid it?

A. Hicks Company.

On cross examination as to the above point Sullivan testified as follows:

Questions by Mr. HUNT:

Q. Now you say you testified that the Roeblings' Sons claim is the only one that has been paid.

A. Yes, of those we have mentioned.

Q. Do you know that it was paid?

A. Well, Hicks Company told me that it was.

Q. Then you are simply testifying to what they



told you?

A. Yes, Roebling never told me.

Q. You don't know of your own knowledge that it was paid, do you?

A. Well, I feel pretty well satisfied that it was.

Q. Simply from what they told you, though?

A. Simply from what I heard from them—not from Roebling.

Q. Well, I won't object to the manner you know it, but do you know how it was paid?

A. I think through a judgment entered against us and Roebling garnisheed the money that Hicks had, for our account.

Mr. HUNT: For the purpose of the record, your Honor, I would like to move that the payment of Roebblings' Sons Company's claim be stricken out for the reason that it was paid under a writ of garnishment served upon the Hicks Company, and under the rule of law, Hicks Company could not retain under this assignment anything due, and therefore whatever they did retain was of course beyond their power to do so.

Thereafter A. C. Sullivan testified in the direct examination, as follows:

Questions by Mr. THOMAS:

Q. I will call your attention to the claim of the Acme Cement Plaster Company. Will you look at the book and see if there is anything there in connection with the Acme Cement Plaster Company?

A. Yes, sir, the book shows we are owing them

\$836.55.

Q. What was that for?

A. It was for plaster.

Q. Where was the plaster used?

A. It was used in making blocks.

Q. And those blocks were used in the Lincoln High School?

A. Lincoln High School building.

Q. Has this sum of \$836.55 been paid?

A. No, sir.

Q. That is still due the Acme Cement Plaster Company?

A. Yes, sir.

Thereupon counsel for the plaintiff moved the court to strike from the record the testimony of A. C. Sullivan relative to the claim of the Acme Cement Plaster Company upon the ground and for the reason that if anything was due the Acme Cement Plaster Company it had not been paid and the amount of the indebtedness thereof was not liquidated; that it was capable of ascertainment and being made certain, and that the witness should not be permitted to testify to unliquidated or contingent claims, and for the further reason that the same was incompetent, irrelevant and immaterial, which motion was denied by the court, to which ruling the plaintiff then and there duly excepted, which exception was then and there duly allowed by the court.

Thereafter counsel for the defendant started to continue the examination of the witness A. C. Sullivan,

relative to the unpaid, unliquidated claims against Sullivan, and counsel for the plaintiff objected to such testimony being received upon the ground and for the reason that all of said claims and accounts alleged to be due and owing from Sullivan to unpaid creditors were unliquidated and uncertain; that the same were pleaded as damages, and were capable of being made definite and certain, and that the same had not been reduced to a definite and certain amount so as to enable the same to be pleaded as an element of damages, and further that any and all of said testimony was incompetent, irrelevant and immaterial to any issues made and presented by the pleadings in this case and to any facts to be determined therefrom, which objection was overruled by the court, to which ruling the plaintiff then and there duly excepted, which exception was then and there duly allowed by the court. Counsel for plaintiff then requested the court that it be considered as making objection to each and all of said testimony relating to any and all of said claims, without any formal objection thereto, and the court then and there stated that the plaintiff should be considered as interposing an objection to each and all of said testimony as relating to any of said claims on account of alleged unpaid creditors of the said Sullivan Fireproof Partition Co.; that all of said objections should be deemed to be overruled by the court and that the plaintiff should in each instance have an exception thereto and which would be and was duly allowed by the court.

Thereafter the examination continued as follows:

Q. That was for material furnished and used in the Lincoln High School Building?

A. Yes, sir.

Q. Now, will you refer to the Atlas Mixed Mortar Company.

A. We are owing them \$121.30.

Q. What for?

A. For sand and hauling.

Q. In what connection?

A. The Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention to the name of the Portland Quarry Company.

A. We are owing them \$134.00 for hauling away rubbish from the Lincoln High School.

Q. Hauling rubbish away from the Lincoln High School?

A. Yes, sir.

Q. In connection with your contract there?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the Columbia Contract Company.

A. We are owing them \$114.08.

Q. For what?

A. For sand furnished to the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention to the name of the Columbia Hardware Company.

A. We owe them \$30.22, as near as I was able to figure it out on the Lincoln High School. We bought hardware from different firms, and a part was delivered to our place on the east side, but as near as I could segregate it, we owe them \$30.22 on the High School.

Q. Do you happen to know the full amount you owe the Columbia Hardware Company?

A. We owe them in addition to the \$30.22—we owe them \$72.33.

Q. But that is not connected with these?

A. No connection with the school.

Q. Has that \$30.22 been paid?

A. No, sir.

Q. I call your attention to the claim of the East Side Transfer Company.

A. We owe them \$75.65.

Q. What is that for?

A. For hauling.

Q. Hauling of what?

A. Hauling blocks.

Q. To the Lincoln High School Building?

A. To the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of E. Hip-



peley.

A. That is still owing, \$32.35.

Q. What was that for?

A. That was for the rent of motors and some repair work, some wiring.

Q. In the Lincoln High School building?

A. In the Lincoln High School, yes, sir, incidental to this contract.

Q. Incidental to this contract. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Northwest Door Co.

A. We are owing them \$51.05.

Q. What was that for?

A. For some wood parts for our machinery as used at the Lincoln High School.

Q. What was that? Just explain so we can understand.

A. They were wood cores that are used in the operation of making these blocks. They usually last the lifetime of one job or so.

Q. These blocks were hollow; is that the idea?

A. They were hollow and these wood cores were used for making that hollow part; after these blocks were molded in a machine, they are taken out and the wood cores were knocked out.

Q. Those are necessary things in the construction of these blocks?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Oregon Transfer Company.

A. We are owing them \$72.75.

Q. What was that for?

A. For hauling at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Portland Machinery Company.

A. We are owing them \$47.85. That is for—I think it was a fan and some dry kiln trucks used in the operation of drying the blocks.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Portland Railway, Light & Power Company.

A. We owe them \$26.80 for power, and \$26.10 for lights at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of George B. Rate.

A. We owe them \$13.75 for some plaster hair.

Q. Plaster hair?

A. Yes, sir.

Q. Was that used at the Lincoln High School?

A. Yes, sir, I think it was; as near as I can tell it was.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Union Oil Company.

A. We are owing them \$78.25.

Q. What was that for?

A. That is for coal oil furnished at the Lincoln High School.

Q. How was it used?

A. It was used as a sort of lubricant in knocking out these cores.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Western Lime & Plaster Company.

A. We owe them \$1285.91.

Q. What was that for?

A. For plaster.

Q. Used at the Lincoln High School building?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of Wright & Branch.

A. Wright & Branch—we owe them a balance of \$1400.00.

Q. A balance of \$1400.00?

A. Yes, sir.

Q. For what?

A. It is a balance due them on a sub-contract that

they took from us for erecting partitions.

Q. In the Lincoln High School Building?

A. In the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the United States Steel Products Company.

A. We owe a balance of \$150.00.

Q. What was that for?

A. That is for wiring—wire—reinforcing wire.

Q. That is used in these blocks? A small wire?

A. A small chicken wire.

Q. Used as a reinforcement?

A. Yes, sir.

Q. That was used in these blocks used in the Lincoln High School?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.

Mr. A. C. SULLIVAN, on being cross examined by counsel for the plaintiff relative to the foregoing testimony, testified as follows:

Questions by Mr. HUNT:

Q. Will you just turn to that book, the pages you had there, Mr. Sullivan, please.

A. Yes, sir.

Q. The Acme Cement Plaster Company, you testified for certain material. What was it? I couldn't understand.

A. That was plaster.

Q. And what was the Atlas Mixed Mortar Company?

A. That was sand and hauling.

Q. That was sand and hauling?

A. Yes, sir.

Q. Can you segregate the two items?

A. Well, hardly. I should say about half and half.

Q. About half and half?

A. That is a guess, though.

Q. And the Portland Quarry Company.

A. That was hauling the rubbish away from the building, broken blocks and the refuse from the floors.

Q. And the Columbia Contract Company?

A. That was for sand.

Q. Any transportation charges in that?

A. What? Hauling to the building, do you mean?

Q. Did they have any transportation charges in this amount you have here?

A. That included the cost of the sand delivered at the High School.

Q. And the Columbia Hardware Company?

A. Why for various forms of hardware we bought from them. Used tools of various kinds.

Q. Tools?

A. Tools, and—oh, parts of machinery and parts of boilers and such as that.

Q. That was a part of your permanent equipment and plant, was it not?

A. Part of it was, yes.

Q. Did any part of that enter into the construc-



tion of the building?

A. No, the tools were only used in carrying out the work of construction, and the parts of the boilers were used in the boilers in the drying of material.

Q. Who purchased from the Columbia Hardware Company?

A. From them?

Q. Yes.

A. There was a foreman.

Q. I mean was it the Sullivan Fireproof Partition Company that purchased from them?

A. Yes, sir.

Q. Now, you spoke of E. Hippeley, \$32.35, rent of a motor. What was that motor used for?

A. It was used in driving the mixer; we had a big tub mixer with which we mixed up the material used in making the blocks. This motor was used in driving that mixer.

Q. You rented a motor from him?

A. Yes, sir.

Q. The Northwest Door Company. You spoke of furnishing wood as a part of the machinery. I didn't understand what that was.

A. They made us a number of wood cores that were used in forming the hollow part of these blocks. We would set these cores down in the machine, and fill the machine up with plaster; then when it hardened we drove these cores out and have the hollow part of the block in their place.

Q. That was a part of the manufacture of the

block, was it not?

A. Yes, a part of the process of making the block.

Q. Now the Oregon Transfer Company was for hauling?

A. Hauling, yes.

Q. Hauling the blocks?

A. Hauling the blocks to the building.

Q. Hauling the wood blocks or the plaster blocks?

A. No, the plaster blocks.

Q. The Portland Machinery Company I believe you said was for dry kiln trucks.

A. Dry kiln trucks, and I think for a fan, if I remember right.

Q. These trucks, just common trucks to put stuff on to carry around?

A. They call it a dry kiln truck; it is used as a part of a car that goes into the dry kiln to carry blocks.

Q. And the fan, what is that?

A. I am not so certain whether their bill included that fan, or whether or not we paid for it. We had a fan and bought it from them, I can't recall whether or not it was paid for.

Q. Then if this bill of \$47.85 does not include the fan, it is all for trucks?

A. Yes, sir, I think that is all we bought from them.

Q. Where are those trucks now?

A. They are over here in a basement where part of this machinery is.

Q. Part of your plant—part of your equipment, are they?

A. They are now, yes.

Q. They were then?

A. They were used as part of the equipment, yes.

Q. Now, the Portland Light & Power Company has a bill of \$52.90 for power and light. What was that power furnished for?

A. To drive the motor.

Q. To drive the motor?

A. Yes, sir.

Q. What motor—the Hippeley motor?

A. Yes, the one that runs the mixer. And also for driving a fan in the dry kiln.

Q. And the light was what?

A. Lights used around the place where we were working.

Q. But this motor, or this power was to drive a motor used in the manufacture of the blocks, was it not?

A. Yes, sir.

Q. George B. Rate, he furnished plaster hair, is that it?

A. Yes, sir.

Q. Plaster hair?

A. Yes, sir.

Q. Wright & Branch had a sub-contract for placing the partitions?

A. For placing the partitions.

Q. And the United States Steel Products Com-

pany for reinforcing?

A. For wire.

Q. Reinforcing wire?

A. Yes.

Q. Is there any man on this list, Mr. Sullivan, who furnished any material directly that went into the building, or wasn't the material that was furnished, furnished the Sullivan Fireproof Partition Company to be afterwards manufactured into stuff that went into the building?

A. The only thing that actually went into the construction of this building as far as we were concerned were these blocks.

Q. That is the thing you manufacture?

A. Yes, sir.

Q. That is the thing you agree to furnish in your contract?

A. We agreed to furnish and erect them.

Q. And erect them?

A. Yes, sir.

Q. And the stuff you speak of here was sold to your company individually in the course of your manufacture?

A. This was all sold to us to be used in making these blocks—I think, without going over each item.

Q. And do you know whether or not any material was furnished by these parties that went into blocks, which blocks were placed in any other buildings and other places, other than the Lincoln High School?

A. Yes, we had a surplus number of blocks from

the school that were taken away and used on the Smith Hotel Building.

Q. Where is that?

A. I think called it Sixth and Main, if I remember right.

Q. That is in the City of Portland?

A. City of Portland, yes, sir.

Q. About how many was that, do you know?

A. Probably about ten thousand feet.

Q. About ten thousand feet?

A. Yes, sir.

Q. And I want to be perfectly sure that a portion of the material that you have testified to here went into these blocks that went into that Hotel at Sixth and Main.

A. Well, how we come to have these, in making blocks that we used in this school, in our machines we got three of the size used in the school and one smaller size, a three inch block used in ordinary partitions, and we had no use at the school for any number of these three inch, such as we would have in making a six inch. We had to provide a place of putting them; it was considered sort of a waste, that is, as far as the school was concerned, so we got this Smith job and hauled a considerable number there, but we were afterwards stopped from doing that by the Hicks Company and the architects, so that we finished up delivering to that building from our place on the East side.

Thereafter when the plaintiff had rested and the



defendant had rested and there was no further testimony or evidence to be offered in behalf of either party, the plaintiff moved the court for a judgment on the pleadings, and also for a verdict and judgment on the pleadings and testimony, which said motions were based upon the following grounds:

1. That the defense of estoppel as set forth in the plaintiff's reply was clearly established and that the defendant Lewis A. Hicks Company was bound by the written assignment of the Sullivan Fireproof Partition Co. to Ladd & Tilton Bank, and the acceptance thereof by the Lewis A. Hicks Company, dated the 18th day of December, 1911, and the written notification given by the said Lewis A. Hicks Company, based on the written assignment and acceptance, which said written notification was dated April 3, 1912, and that the facts and matters set forth in the pleadings by the defendant did not constitute a defense to the matter of estoppel pleaded by the plaintiff.

2. That the claims for materials furnished and labor done by the materialmen and laborers were contingent and uncertain; that the same was pleaded as a matter of defense and as damages; that the same were improper and insufficiently pleaded, and further were pleaded as uncertain and unliquidated damages and the same did not constitute a proper defense or any defense to the plaintiff's action and the testimony admitted thereon was not properly received; that the said defense and allegations thereof and the testi-

mony thereto should be disregarded.

3. That the materials furnished by the materialmen and the labor performed by the laborers was not such as would give rise to or sustain a mechanic's lien in the State of Oregon.

4. That inasmuch as the building which the Lewis A. Hicks Company had a contract to erect and was erecting was a public school building and could not be liened by materialmen or laborers the bond which the Lewis A. Hicks Company gave to insure the performance of its contract took the place of the building for the purpose of mechanics' liens, and that if a mechanic's lien could not have been successfully asserted against a building which would be lienable under the laws of the State of Oregon on account of materials or labor furnished, then such claim could not be successfully placed or filed against said bond, and further that no greater right or privilege was given by or could be asserted against the said bond than against a lienable building under the laws of the State of Oregon.

5. The testimony shows that all of the materials furnished to the Sullivan Fireproof Partition Co., the sub-contractor, did not enter into the Lincoln High School building, the building which the Lewis A. Hicks Company was under contract to erect, and that under the laws of the State of Oregon relative to mechanics' liens the various bills for labor and materials were not capable of being asserted against the bond which took the place of the building for lien purposes.

6. That the testimony shows that the materials furnished by the various materialmen and the labor performed by the various laborers for the Sullivan Fireproof Partition Co. on account of its sub-contract with the Lewis A. Hicks Company, was furnished and performed upon the credit of the Sullivan Fireproof Partition Co. and not upon the credit of the building or upon the credit of the bond, and furthermore that none of the materials furnished the Sullivan Fireproof Partition Co. entered into the said building, but the same were used for the purpose of manufacturing a new commodity, entirely separate and distinct from the component parts thereof, and composed of the materials furnished by the various materialmen, and the whole character of the materials being changed and commingled into a new and distinct manufactured article, they lost their original character to such an extent as to be non-liable items under the laws of the State of Oregon against the bond, the bond having taken the place of the building for the purpose of mechanics' liens.

Which said motions the court overruled, to which ruling the plaintiff then and there duly excepted, which exception was then and there duly allowed by the court.

That the testimony relating to the said motions is as follows, which said testimony as here follows is all of and the whole of said testimony and exhibits offered by the plaintiff and the defendant during said trial, and that no other testimony, evidence or ex-

hibits were offered or received in the trial of said cause.

ROBERT S. HOWARD, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. HUNT:

You are Mr. R. S. Howard?

A. I am.

Q. What position if any do you hold with the Ladd & Tilton Bank?

A. I am assistant cashier of Ladd & Tilton Bank.

Q. And you were such assistant cashier in the month of December, 1911?

A. I was.

Q. And have been such assistant cashier since that time, down to the present time?

A. I have been.

Mr. HUNT: It is admitted in the pleadings, your Honor, that Ladd & Tilton Bank is a corporation entitled to do a banking business and loan money.

Q. I will ask you to state whether or not you know Mr. A. C. Sullivan.

A. I do.

Q. When did you first become acquainted with that gentleman?

A. In early December, 1911.

Q. Do you know whether or not Mr. Sullivan is an officer connected with the Sullivan Fireproof Partition Company?

A. He is secretary.

Q. Where was the place where you first saw Mr. Sullivan?

A. I met him in the Ladd & Tilton Bank.

Q. Did Mr. Sullivan have any purpose in approaching the bank at that time, or you?

A. Yes, he sought me for the purposes of a banking credit.

Q. And are you entitled by virtue of your position as assistant cashier in Ladd & Tilton Bank to loan banking funds?

A. Subject to the Finance Committee and under our local rules.

Q. Mr. Sullivan, I understand, approached you for a loan?

A. A loan, yes.

Q. What amount was asked for, Mr. Howard?

A. He said he needed \$3500.00.

Q. And thereupon what did you do?

A. I went through the usual procedure of introduction and verification and discussions.

Q. Did you require any submission of statements or other evidences of his solvency?

A. I asked him for a statement of the Sullivan Partition & Fireproof Company—Fireproof Partition Company.

Q. And was such a statement rendered you?

A. It was.

Q. Have you that with you?

A. I have. (Producing it.)



Q. Mr. Howard, I hand you an instrument which purports to be a statement of financial liabilities of the Sullivan Fireproof Partition Company, and will ask you to state if that instrument is what it purports to be.

A. It is.

Q. Is that the signature of Mr. Sullivan?

A. Sullivan, yes. Mr. A. C. Sullivan signed it as secretary.

Q. That was handed to you at that time ?

A. Yes, about that time ; yes.

Mr. HUNT: Now, I would like to ask to introduce this in evidence, your Honor.

Mr. THOMAS: We object as incompetent, immaterial and irrelevant in this case.

Mr. HUNT: I would like to show why it is competent if your ruling has not been announced. The chief defense, we might say, in this case is going to be that of estoppel and we want to show what the assets of the Sullivan Company were at the time we brought the suit—what we could have realized.

Mr. THOMAS: This is dated December, 1911, and can't possibly have any effect on us in this matter, in reference to matters occurring three or four months afterwards particularly.

COURT: I understand counsel expects to show conditions in 1912.

Mr. HUNT: I do, your Honor, but this statement shows a portion of the assets.

COURT: It is admitted, subject to counsel's ob-

jection, for whatever it may be worth hereafter.

Mr. THOMAS: Shall I take an exception at this time?

COURT: It is not necessary.

Mr. THOMAS: This is an action at law and the jury has been waived. If no exceptions are necessary, of course we wont take one.

Mr. HUNT: I wish to state, your Honor, that this is a financial statement submitted by the Sullivan Fireproof Partition Company, and shows assets in the sum of \$27,334.00. The corporation had subscribed capital stock of \$22,500, which was properly figured in the liabilities, making a total liability of \$27,334.00, but leaving out the capital stock, it leaves total assets of about \$22,000.00.

Statement admitted in evidence and marked

### PLAINTIFF'S EXHIBIT 1.

Corporations

To Ladd & Tilton Bank, Portland, Ore.

Name (Corporate style under charter) Sullivan Fireproof Partition Company.

Business, Mfg. fireproof partition tile.

Location, Tacoma, Wash. Branches, Main 4675, Portland, Ore. 617 Bd. of Trade.

For the purpose of procuring credit, from time to time, with the above bank for our negotiable paper, or otherwise, we furnish the following as being a fair and accurate statement of our financial condition on the seventh day of December, 1911.

Assets.

Cash in Portland Trust Co. Bank.....	\$ 348.50
Cash on hand .....	
Bills Receivable, Good .....	655.00
Accounts Receivable, Good .....	3,855.50
Merchandise, finished (How valued, market) .....	3,075.00
Merchandise, unfinished (How valued....)..	
Raw Material (How valued, cost approx.)..	650.00
Real Estate .....	
Machinery and Fixtures .....	8,750.00
Other assets and of what composed.	
Patent rights .....	10,000.00
.....	
.....	
.....	
.....	
.....	
.....	
Total.....	<hr/> \$27,334.00

Liabilities.

Bills Payable for Merchandise.....	\$
Bills Payable to Own Banks.....	3,000.00
Bills Payable for Paper Sold.....	
Open Accounts .....	950.00
Bonded Debt (When Due .....).	
Interest on Bonded Debt .....	
Mortgages or Liens on Real Estate.....	

Chattel Mortgages .....

Loans or Deposits .....

Other indebtedness and of what composed.

.....

.....

.....

.....

Total liabilities ..... 3,950.00

Capital ..... 22,500.00

Surplus ..... 884.00

Total.....\$27,334.00

#### Contingent Liability:

Accommodation Endorsements, nil.

Endorsed Bills Receivable Outstanding, nil.

Specify any of the above Assets pledged as collateral.

None.

Specify any of the above Liabilities secured by collateral.

None.

#### Capital.

Authorized, \$40,000.00. Subscribed, \$40,000.00.

Paid in, \$22,500.00.

Held by Company as Treasury Stock, \$17,500.00.

How paid in: Cash \$..... Other property,  
Plant, equipment, stock, patent rights, \$22,500.00.

Description of other property and how valued:  
Property taken over was as above with outstanding

accounts and valued on invoice of cost and market price.

Incorporated in what State and under what general Law or Special Act: State Law of Washington.

Date of Charter, July 16, 1910. Commenced Business September 1, 1909.

Are Stockholders liable beyond amount of stock subscribed? No.

Amount of annual business, \$44,600.00. Amount of annual expenses, \$24,340.00. Annual Dividends 1910-11, 30 per cent.

Insurance carried on Merchandise, \$2000.00. On Real Estate, —.

Give basis of statement, whether actual inventory, by whom taken and date, or if Estimate, by whom made and date: Made on estimate of secretary as of December 6, 1911.

What amount, if any, of Acc'ts and Bills Rec. are past due, extended or renewed? Nil.

State last date of taking trial balance and if same proved.....Regular times of balancing books, August first.

Regular times of taking inventory, August first.

#### OFFICERS.

Name in Full—Address.

President, J. D. Sullivan. Address, 1064 E. 1st So. St., Salt Lake City, Utah.

Vice-President, A. C. Sullivan. Address, Buena Vista Apt., Portland, Ore.



Secretary, A. C. Sullivan. Address, Buena Vista Apt., Portland, Ore.

Treasurer, J. D. Sullivan.

#### DIRECTORS.

Name in Full—Address.

J. D. Sullivan.

A. C. Sullivan, Seattle, Wash.

Dan Swinehart, Seattle, Wash.

J. A. Murphy.

In whom is vested authority by resolution of the Board of Directors to sign notes binding the Corporation? J. D. Sullivan, President, and A. C. Sullivan, Secretary.

Please sign here .....

By A. C. Sullivan, Secy.

Date Signed, Dec. 7, 1911.

Q. Will you please state to the court the conversations had with Mr. Sullivan relative to this loan at this time.

Mr. THOMAS: We desire to object to this evidence, also if your Honor, please, for the same reason, being incompetent, immaterial and irrelevant.

COURT: I don't know what that has to do with it.

Mr. HUNT: A matter leading up to show how we obtained this assignment.

COURT: He can testify to that.

A. On talking with Mr. Sullivan, I said to him that his condition hardly warranted the loan he asked for, and after further talk, he offered the assignments

of moneys due or about to be due, or to become due on the work he was doing for the Lewis A. Hicks Company on the new Lincoln High School. I told him that, following the usual course of banking methods, if he would get an acceptance of such an order, we would be glad to finance it to that extent.

Q. Did Mr. Sullivan, pursuant to that conversation, get the accepted order from the Lewis A. Hicks Company?

A. He did.

Q. I hand you a paper, Mr. Howard, which purports to be an assignment of funds due the Sullivan Fireproof Partition Company from Hicks, signed by Sullivan and accepted by Hicks, and will ask you to state if that instrument is what it purports to be.

A. Do you wish me to read that in the record?

Q. No. Just state if that is what it purports to be.

A. It is.

Q. That is what was handed to you?

A. That is what was brought in to us.

Mr. HUNT: We desire to offer that.

A. Duly accepted.

Mr. HUNT: The execution of this assignment is admitted in the pleadings, so we will not prove that.

Mr. THOMAS: No objection.

Marked Plaintiff's Exhibit 2, and read as follows:

"Portland, Oregon, December 18, 1911.

Lewis A. Hicks Company,

Worcester Building,

City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all monies now due and all that may become due on that certain contract between yourselves and the undersigned for partition work in the new Lincoln High School in this city. This order is meant to cover only as to payments and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,

SULLIVAN FIREPROOF PARTITION COMPANY.

J. D. Sullivan, Pres.

A. C. Sullivan, V. Pres. and Secy.

ACCEPTED:

LEWIS A. HICKS COMPANY,

By Geo. Wagner, Mgr."

Q. Upon receipt of that assignment did Ladd & Tilton Bank advance to the Sullivan Fireproof Partition Company \$3500.00?

A. They did, in maturities of thirty, sixty and ninety days.

Q. How was that indebtedness evidenced?

A. By notes, one a thousand dollars, the second a thousand dollars, and \$1500.00 being ninety day maturity, the last one.

Q. Have you those notes with you?

A. I have. (Producing them.)

Q. I hand you what purports to be a promissory note made payable to Ladd & Tilton Bank for one thousand dollars, signed by the Sullivan Fireproof

Partition Company, dated December 18, 1911, and ask you to state if that instrument is what it purports to be.

A. It is.

Q. That was executed by the Sullivan Fireproof Partition Company?

A. It was.

Mr. HUNT: We desire to offer that in evidence.

Mr. THOMAS: No objection.

Marked Plaintiff's Exhibit 3.

\$1000.00                      Portland, Oregon, Dec. 18th, 1911

Sixty days after date, without grace, Sullivan Fireproof Partition Co. promise to pay to the order of LADD & TILTON BANK, at Ladd & Tilton Bank, Portland, Oregon, One thousand and 00|100 Dollars, in U. S. Gold Coin, for value received, with interest from date in like coin, at the rate of eight per cent per annum, until paid.

And in case suit or action is instituted to collect this note, or any portion thereof, said company promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

SULLIVAN FIREPROOF PARTITION CO.

By J. D. Sullivan, Prest.

By A. C. Sullivan, Secty.

No. 17553. Due Feb. 16, 1912.

June 29, 12

Address, Sullivan Tile Co., 129 E. Water. Phone E 586.

Mar. 23-12. Int. paid to Mar. 23, 1912, \$21.33.

Q. I hand you, Mr. Howard, what purports to be a promissory note in the sum of \$1500.00, dated December 18, 1911, payable to Ladd & Tilton Bank and signed Sullivan Fireproof Partition Company, and will ask you to state if that instrument is what it purports to be.

A. It is.

Q. Is that the signature of the Sullivan Fireproof Partition Company?

A. It is.

Mr. HUNT: We desire to offer this in evidence. It is of similar import only ninety days after date, your Honor.

Marked Plaintiff's Exhibit 4.

\$1500.00                      Portland, Oregon, Dec. 18, 1911.

Ninety days after date, without grace, Sullivan Fireproof Partition Co. promise to pay to the order of LADD & TILTON BANK, at Ladd & Tilton Bank, Portland, Oregon, Fifteen hundred and 00/100 Dollars, in U. S. Gold Coin, for value received, with interest from date in like coin, at the rate of eight per cent per annum, until paid.

And in case suit or action is instituted to collect this note, or any portion thereof, said company promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

SULLIVAN FIREPROOF PARTITION CO.

By J. D. Sullivan, Prest.

By A. C. Sullivan, Secy.



No. 17554. Due Mar. 17, 12.

June 29, 1912.

Address, Sullivan Tile Co., 129 E. Water. Phone E 586.

Mar. 23-12. Int. paid Mar. 23-12, \$32.00.

Q. Mr. Howard, I hand you what purports to be a promissory note dated January 17, 1912, in the sum of one thousand dollars, made payable to Ladd & Tilton Bank, signed by Sullivan Fireproof Partition Company, and will ask you to state if that instrument is what it purports to be.

A. It is.

Q. Is that signed by the Sullivan Fireproof Partition Company?

A. It is.

Mr. HUNT: We offer this in evidence. It is the same as the other notes, dated January 17, 1912, due March 17, 1912.

Marked Plaintiff's Exhibit 5.

\$1000.00                      Portland, Oregon, Jan. 17, 1912.

On March 17, 1912, after date, without grace, Sullivan Fireproof Partition Co. promise to pay to the order of LADD & TILTON BANK, at Ladd & Tilton Bank, Portland, Oregon, One thousand & 00|100 Dollars, in U. S. Gold Coin, for value received, with interest from date in like coin, at the rate of eight per cent per annum, until paid.

And in case suit or action is instituted to collect this note, or any portion thereof, said company promise to pay such additional sum as the Court may ad-

judge reasonable as attorney's fees in said suit or action.

SULLIVAN FIREPROOF PARTITION CO.

By J. D. Sullivan, Prest.

By A. C. Sullivan, Secy.

No. 18116. Due March 17, 1912.

June 29, 1912.

Address, Sullivan Tile Co., 129 E. Water. Phone E 586.

Mar. 23-12. Int. paid to Mar. 23-12, \$14.66.

Q. Will you please state, Mr. Howard, if these notes represent the only loans made by Ladd & Tilton Bank to the Sullivan Fireproof Partition Company.

A. The only loans except a little note for an overdraft which doesn't effect this case.

Q. Were those notes just introduced in evidence, marked Plaintiff's exhibits 3, 4 and 5, the notes for which the assignment, marked plaintiff's exhibit 2, was given?

A. They are the notes.

Q. Will you please state, Mr. Howard, if any of the principal of these notes has been paid by the Sullivan Fireproof Partition Company or any one on its behalf.

A. Nothing.

Q. Has any sum been paid on the interest?

A. I think the interest was paid there—the interest shows as having been paid on each of the notes to March 23, 1912.

Q. Subsequent to the time of the execution and delivery of the assignment, marked Plaintiff's exhibit 2, and the execution and delivery of the promissory notes, marked plaintiff's exhibits 3, 4 and 5, did the Lewis A. Hicks Company pay the Ladd & Tilton Bank any moneys?

A. 'Question please.

Q. (Read.)

A. No.

Q. I mean, Mr. Howard, did the Lewis A. Hicks Company pay the Ladd & Tilton Bank the money earned by Sullivan under this contract?

A. Yes—you mean for the parties?

Q. Yes.

A. Yes, they made several payments; all made to the Ladd & Tilton Bank. I didn't understand your question.

Q. Were those payments made by check?

A. By check.

Q. And payable to the order of Ladd & Tilton Bank?

A. Ladd & Tilton Bank.

Q. And what method did Ladd & Tilton Bank adopt as to putting that fund—was it credited on the notes, or was the fund released for some other purpose?

A. It was released. They were endorsed—the checks were endorsed without recourse and turned over.

Q. Were endorsed by Ladd & Tilton Bank?

A. By Ladd & Tilton Bank.

Q. And were turned over to whom?

A. Turned over to Sullivan Fireproof Partition Company.

Q. Mr. Howard, do you know at what time the Sullivan Fireproof Partition Company completed its sub-contract with Lewis A. Hicks?

A. About March 15, 1912.

Q. Did you at that time make any effort or endeavor to collect what money was due you from the Sullivan Fireproof Partition Company?

A. Yes. On or about that date I was asked to release \$700. The way it begun—

Q. (Interrupting) By whom were you asked?

A. I was asked—Mr. Sullivan wanted to pay some bills and I told him that I would now have to have some definite date at which these moneys would be paid to us by the Lewis A. Hicks Company, and a representative from their office came in—

Q. (interrupting) Do you know what that gentleman's name was?

A. Mr. Catz or Katz, and he told me, as I remember, that the lien time—that Sullivan had finished—

MR. THOMAS: If the court please, it seems to me a conversation of that kind is not admissible in that particular connection. They are hanging upon a letter written by the Hicks Company to the Sullivan Fireproof Partition Company.

COURT: You are leading up?

Q. I am leading up.

Mr. HUNT: To show this was for Ladd & Tilton Bank and not for the Sullivan Company.

A. That the lien time against Mr. Sullivan's work would run out the latter part of the month, and that on or about May 1st they would be ready to pay us. I told him there was no objection to waiting but the time had arrived when I must have from them—from the Hicks Company—some definite date that I could look to for a settlement. And after that conversation Mr. Sullivan came in with the letter which has been read.

Q. It hasn't been introduced yet. I will hand you what purports to be a notification to the Sullivan Fireproof Partition Company, dated April 3rd, stating that \$4300.00 was due on the contract, and will ask you to state if that instrument is what it purports to be.

A. Yes.

Q. Do you know if that is the signature of the Lewis A. Hicks Company by Mr. Katz? That is Mr. Katz's signature?

A. Yes.

Mr. HUNT: The execution has been admitted in the pleadings and I will ask to have it introduced in evidence.

Marked Plaintiff's Exhibit 6, and read as follows:

"April 3rd, 1912.

Sullivan Fireproof Partition Co.,

City.

Gentlemen:



As your work has been completed on the Lincoln High School there will be due you on or about May 1st the balance of \$4300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,

LEWIS A. HICKS COMPANY.

By Fred A. Katz."

Q. You will please state whether or not the notification just read and marked plaintiff's exhibit 6, was made by the Lewis A. Hicks Company at the request of Ladd & Tilton Bank.

A. It was.

Q. Upon receipt of the notice of April 3rd, Mr. Howard, what action did the bank take towards this indebtedness of the Sullivan Fireproof Partition Company?

A. They released this \$700 requested, and waited for this maturity of Hicks.

Q. The maturity mentioned in the notification?

A. In the notification.

Q. Which date was May 1st?

A. May 1st, 1912.

Q. I will ask you to state whether or not at the date mentioned in the notification of April 3rd, which date is May 1st, if you made a demand on the Lewis A. Hicks Company for the balance due of \$3600.00?

A. Very soon thereafter. The exact date I didn't, but in a few days afterwards, I commenced agitation for this payment.

Q. And with whom did you communicate?

A. I communicated with, indirectly—first with Mr. Sullivan, and then communicated with Hicks Company's Office.

Q. What were you told by the Lewis A. Hicks Company at the time you communicated with them?

A. I was told that there was something had arisen there, which they couldn't—wouldn't pay us. That Mr. Hicks would be up in a few days from San Francisco and would take the matter up with us.

Q. Did Mr. Hicks come to the city of Portland in a few days?

A. He came in to see us.

Q. And what was the conversation you had with Mr. Hicks at that time?

A. Mr. Hicks said he desired to look into the matter; that he had just come up, and from his office learned that the Sullivan people were falling behind in their outstanding accounts, and that he wanted to seek the services of an attorney.

Q. Anything further said in that conversation?

A. Then later, I was—other than stimulating the matter, nothing further with Mr. Hicks.

Q. Did you later see Mr. Hicks?

A. I saw—Mr. Hicks came in the bank once, and I had a word or two with him, but nothing came of it. He was yet looking into the matter.

Q. Did Mr. Hicks at that time refuse to pay Ladd & Tilton—definitely refuse to pay Ladd & Tilton Bank?

A. He did.

Q. Or was he simply considering the matter, whether or not he would pay?

A. Oh, no. He said that he couldn't pay it.

Q. Did he assign any reason for not paying it?

A. On account of the indebtedness of the Sullivan people.

Q. Did he specify at that time what that indebtedness was?

A. No.

Q. Will you please state, Mr. Howard, the first time that you heard the Sullivan Fireproof Partition Company was indebted on account of the labor and material furnished under this sub-contract to the new Lincoln High School.

A. I have a note here that since this—our demand for the recognition of this promise to pay on May 1st.

Q. You first learned of that?

A. After that date.

Q. After May 1st?

A. After May 1st, 1912.

Q. And of course that would be subsequent then to the delivery of that notification of April 3rd?

A. It was.

Q. Will you please state, Mr. Howard, if you have ever seen the contract—if you had seen, prior to May 1st, 1912, the contract entered into by and between

the Sullivan Fireproof Partition Company and the Lewis A. Hicks Company?

Mr. THOMAS: We object as being immaterial, if your Honor please. They having accepted this order subsequent to the contract, they are bound to know the conditions of it.

COURT: He can state whether he ever saw it or not.

A. I saw it today for the first time.

Q. Did you at the time of the assignment, dated December 18th—did either Mr. Sullivan or any one on behalf of the Sullivan Fireproof Partition Company, or Mr. Hicks or any one on behalf of the Lewis A. Hicks Company, inform Ladd & Tilton Bank of the terms of that contract?

A. No.

Q. Did you or the Ladd & Tilton Bank have any knowledge that the Hicks Company could reserve money or funds under that contract?

A. No.

Q. Mr. Howard, if you had been informed by the Lewis A. Hicks Company or the Sullivan Fireproof Partition Company at any time prior to May 1st, 1912, that the Sullivan Fireproof Partition Company had an outstanding indebtedness on account of its sub-contract with the Hicks Company on account of the furnishing of labor and material to the new Lincoln High School, which indebtedness was in excess of the funds due to the Sullivan Fireproof Partition Company, would you or the Ladd & Tilton Bank have

taken any action at that time, looking towards the collection of your indebtedness, or obtaining security therefor?

Mr. THOMAS: I object, if your Honor please, as calling for a conclusion of the witness, and as wholly immaterial.

Mr. HUNT: If your Honor please, the gist of this whole case—I am willing to agree if it will save counsel any trouble, that without this question of estoppel, I don't think we are in court, but on the question of estoppel it is the whole case.

COURT: He can answer the question.

Question read.

A. Yes, we would have immediately been compelled to look to such assets as we could find of the Sullivan Fireproof Partition Company.

Q. Under similar conditions—or do you know what action Ladd & Tilton Bank would have taken—what definite action?

A. They would have commenced suit immediately.

Q. Against the Sullivan Company?

A. Against the Sullivan Company and the Lewis A. Hicks Company.

Q. Do you know whether or not the Sullivan Fireproof Partition Company is or was, on or about—subsequent to May 15th—a solvent and going concern?

A. Subsequent to May 1st, 1912?

Q. Yes.



A. They were insolvent.

Q. Were insolvent?

A. Yes.

Q. Do you know whether or not prior to the 1st day of May, 1912, the Sullivan Fireproof Partition Company was solvent or insolvent?

A. I do not.

Q. Do you know whether or not subsequent to the 15th day of May, 1912—on or about the 15th day of May 1912, the Sullivan Fireproof Partition Company had any assets out of which you could have realized upon an execution for judgment, if you had obtained one?

A. I do not.

Q. Have you made demand upon the Sullivan Fireproof Partition Company, subsequent to the 1st day of May, 1912, for the payment of the indebtedness to the Ladd & Tilton Bank?

A. Read the question.

Question read.

A. Yes, sir, we were asking for these moneys.

Q. And your indebtedness, has it been paid?

A. It has not.

Q. And is unpaid now?

A. Is unpaid now.

Mr. HUNT: I think that is all, if I may recall Mr. Howard later.

Cross Examination.

Questions by Mr. THOMAS::

Mr. Howard, what was your system with the Sul-

livan Company when these moneys were paid into the bank by the Hicks Company? You say that the checks were made payable to the Ladd & Tilton Bank, and you endorsed them without recourse. What happened then?

A. They were handed back to Mr. Sullivan.

Q. What did he do with them?

A. He, I believe, deposited them to his account.

Q. He deposited them to his checking account?

A. His checking account.

Q. And he checked out against these?

A. Yes.

Q. In your bank?

A. In our bank.

Q. When reference was made to liens, the lien time expiring, did you know what kind of liens were referred to at that time?

A. I did not, Mr. Thomas, but I assumed it was the regular building conditions. That term or that inference was used.

Q. Now, Mr. Howard, was it your understanding from that conversation that if the lien time hadn't expired, and liens were filed, that your claim against the Sullivan Company would be reduced to the extent of the liens filed against the building?

A. No. My understanding of that particular situation was that the work had been finished and there were certain moneys ready to be paid Ladd & Tilton, and that after this latter part of April, this lien time would be relieved.

Q. But what I was attempting to ask was that if the liens had been filed in the meantime, prior to the expiration of the supposed period, didn't you understand that the amount coming to the Sullivan Company from the Hicks Company would be reduced to the extent of the liens that might be filed against the building?

A. No. I treated the matter as we do all of those loans to contractors. It is the custom here to advance contractors on architectural acceptance.

Q. Then why were you talking about liens, and fixing an expiration period of May 1st?

A. Because he used that with me. I was urging them to name a particular date at which we would be paid. They asked me for a further release of this \$700.

Q. In other words, their understanding was that they wouldn't be released from liability until after the lien period had expired, and he was supposing that if they paid you then, and liens were filed, that they would have to make a double payment. Isn't that what he had in mind?

A. I don't know what he had in mind, but I was simply fixing a definite date on which we would receive our money, so as to know where this \$700.00 could be realized.

Q. Had not there been some talk prior to that time, Mr. Howard, about the Sullivan Company giving a chattel mortgage upon its plant, or something like that? Was there any talk about that?

A. No.

Q. That thing was never discussed?

A. Never discussed.

Q. Never at any time?

A. I wouldn't have loaned this money but for this acceptance.

Q. I am talking about subsequent to this time?

A. No.

Q. And Mr. Hicks declined to pay?

A. No.

Q. No chattel mortgage proposition?

A. No.

Witness excused.

A. C. SULLIVAN, a witness called by the plaintiff, beign first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. HUNT:

You are Mr. A. C. Sullivan?

A. Yes, sir.

Q. Are you one of the officers of the Sullivan Fire-proof Partition Company?

A. I was, yes.

Q. Well, are you not now?

A. Why, I couldn't say that I am. I haven't considered myself so for some months.

Q. Were you an officer in December, 1911?

A. Yes, sir.

Q. And were you an officer of the company during the months of April and May, 1912?

A. Yes, sir.

Q. Such office being secretary?

A. Yes, sir.

Q. You will please state whether or not the Sullivan Fireproof Partition Company had a contract with the Lewis A. Hicks Company for a portion of the work on the New Lincoln High School in this city?

A. It did, yes.

Q. Whom was that contract originally with, Mr. Sullivan?

A. It was originally arranged with Mr. Lewis A. Hicks.

Q. And who was the sub-contractor?

A. It was in the name of my father, J. D. Sullivan.

Q. You will please state whether or not that sub-contract was assigned by J. D. Sullivan?

A. Yes, sir, it was.

Q. To whom?

A. To the Sullivan Fireproof Partition Company.

Q. And was that with the consent of the Lewis A. Hicks Company?

A. Yes, sir.

Mr. THOMAS: I would state in this connection that the original assignment of Mr. Sullivan to the Sullivan Fireproof Partition Company we have not been able to find, but we are perfectly willing to admit, and I guess the plaintiff is, that it was assigned. We both depend upon that.

Mr. HUNT: Yes.

Q. I hand you what purports to be articles of



agreement between J. D. Sullivan, of Salt Lake City, and Lewis A. Hicks Company, dated the 29th day of April, 1911, and will ask you if that instrument is what it purports to be.

A. Yes, sir, this is the original contract.

Q. This is the original contract?

A. Yes.

Q. This agreement was signed by Lewis A. Hicks, President, and by J. D. Sullivan, by A. C. Sullivan, his attorney in fact?

A. Yes, sir.

Q. Is that your signature?

A. Yes, sir.

Q. A. C. Sullivan Attorney in fact?

A. Yes, sir, for my father.

Mr. HUNT: We will ask to have this in evidence. Marked Plaintiff's Exhibit 7.

Mr. HUNT: The contract is long, your Honor, and I will not attempt to read it. I want to state, however, that the effect of several of the provisions of the contract is that no money shall be due or be deemed earned by the Sullivan Fireproof Partition Company until the claims for labor and material on account of the work done on the contract shall be paid, and that the sub-contractor, Mr. Sullivan, shall render and submit to the contractor, Mr. Hicks, upon his demand or upon certain times, under his hand and seal statements to the effect that a certain amount of work is paid for, or that certain bills are due or owing. I want to state that now, your Honor, for the founda-

tion of certain testimony later on, to the effect that the Lewis A. Hicks Company had ample machinery provided in this contract whereby they could have found that the Sullivan Fireproof Partition Company was in financial trouble at the time that this notification of April 3rd was given, and if they didn't do so, that was negligence, and negligence is as much an element of estoppel as is fraud. Across the face of the contract is written the following: "Approved bond of Surety Co. in sum of \$6000.00 to be furnished before contract is effective, together with certified copy of power of attorney." Signed Lewis A. Hicks.

Q. Will you state whether or not, Mr. Sullivan, the bond as mentioned in that contract was furnished the Lewis A. Hicks Company?

A. Yes, sir.

Mr. THOMAS: We object because that is the bond referred to in the reply that is stricken out. It can't possibly affect this case in any way, so far as I can see. If we are compelled to pay Ladd & Tilton in this matter, we can't collect anything from a bond of that kind. It is a bond that the Sullivan Company should perform the conditions of this contract, pay these men, pay for the material, etc. That is as far as it goes. If we pay Ladd & Tilton, we are not paying them for material furnished or for labor performed under this contract. The fact that they have security makes no difference.

COURT: Let it go in the record subject to objection. I won't take the time to examine it. Just put it

in subject to Mr. Thomas' objection.

Q. I hand you, Mr. Sullivan, what purports to be a bond by the United States Fidelity & Guaranty Company, as surety with the Sullivan Fireproof Partition Company as principal and the Lewis A. Hicks Company, as Obligee, in the sum of \$6000.00, dated the 3rd day of November, 1911, and will ask you to state if that instrument I hand you is what it purports to be.

A. Yes, sir, that is the bond that accompanied that contract.

Q. That is the bond that accompanied the contract?

A. Yes, sir.

Mr. HUNT: I will introduce this in evidence.

Mr. THOMAS: Subject to our objection.

COURT: Subject to Mr. Thomas' objection.

Marked Plaintiff's Exhibit 8.

Q. Mr. Sullivan will you please state at what time or about what time you approached Ladd & Tilton Bank for a loan?

A. I think it was December 17th or 18th, 1911.

Q. And were you asked at that time for a statement of your financial liabilities and assets?

A. Yes, sir.

Q. I hand you plaintiff's exhibit 1, and ask you if that is the statement rendered at that time?

A. Yes, sir.

Q. That was made out by you?

A. Yes, sir.

Q. Did Ladd & Tilton Bank at that time loan you the money you requested?

A. Yes, sir.

Q. Did they require any further security?

A. Yes. I offered them security in the way of an assignment of this building contract, and they accepted that as security.

Q. That assignment was made by you upon the Lewis A. Hicks Company at the request of the bank?

A. Well, they offered us the loan if we would furnish them that security.

Q. I hand you plaintiff's exhibit 2, and ask you if that is the assignment made at that time?

A. Yes, sir.

Q. At the time you applied to the bank for this loan, had you started to fulfill your contract with the Hicks Company?

A. Yes, sir.

Q. For the partition work?

A. Yes, sir.

Q. And how far advanced was your contract at the time, December 18th, the first of these loans?

A. Well, as near as I could say, I would say it was about half finished.

Q. About half finished?

A. Yes, sir.

Q. Do you know, Mr. Sullivan, at what time the Sullivan Fireproof Partition Company finished its sub-contract with the Hicks Company, on that building?

A. Well, it was about the middle of March. We still had a little work to do that took us a few days beyond that.

Q. It was substantially completed the middle of March?

A. Yes, sir.

Q. Did Ladd & Tilton request from you at that time a settlement of your indebtedness?

A. Yes, sir.

Q. Now, will you please just state what conversation was had between you and the bank, at that time, when they demanded the payment of the indebtedness.

A. Well, Mr. Howard had written me and had spoken to me when I was in the bank several times, as to when they would receive their money, and had asked for payment in that way. They wanted the notes taken up.

Q. Did the bank make any insistent claim for the money along about the 1st of April?

A. Well, they made several insistent requests for the money about that time. I can't recall whether there was one made on the first.

Q. Did Ladd & Tilton Bank, along about the 1st of April, demand from you a statement as to what was due or earned under that contract?

A. No, I don't think so. Don't remember of any.

Q. Did you offer to furnish to the bank at that time any statement of the money due, and when it would be paid?



A. Well, I talked it over with Mr. Howard and explained that we were through with the work and that it was probably a matter of only a few days until we would have the balance of the money due. And it was at that time that I made this request for a payment of \$700.00 which—there was a balance of about \$4300.00 due us and we were owing the bank about \$3600.00, and I wanted to take—wanted to receive a payment for the difference in order to pay off some of the accounts that were pushing us at that time.

Q. Did you secure a statement from the Lewis A. Hicks Company as to what amount of money was due you under your contract?

A. Yes, sir.

Q. And at whose request was that statement secured?

A. At Mr. Howard's.

Q. Did Mr. Katz of the Lewis A. Hicks Company prepare that statement?

A. Yes.

Q. Which is marked Plaintiff's Exhibit 6. And Mr. Katz knew that it was prepared for the bank—at the bank's request?

A. Yes, I made a request also to Mr. Katz at first for a payment of this account, and showed him where it was over and above any demand that the bank had, and that I had accounts to about that amount that I would like to pay, and he told me they wouldn't pay anything until—unless the bank would waive on it.

Q. Would waive on what?

A. On whatever amount they should pay. So he went to Mr. Howard, and Mr. Howard told him what he wanted in the way of this letter, naming a period when the balance should be paid.

Q. That is Mr. Katz went to Mr. Howard?

A. Yes, sir, and Mr. Katz later told me what it was that Mr. Howard wanted, and we talked it over in the Hicks Company's office and Mr. Katz prepared this letter, directed to us, stating the amount due us and the amount to be paid.

Q. Was it understood at that time that that letter, the April 3rd notification, was to be handed to Ladd & Tilton Bank?

A. I think it was so understood, yes, sir.

Q. You spoke, Mr. Sullivan, about wishing to have \$700 released to satisfy certain claims. Did the Lewis A. Hicks Company know that you had these outstanding claims of \$700.00 worth?

A. Yes, I told them.

Q. You told them that you had them outstanding?

A. Yes, sir.

Q. And the Lewis A. Hicks Company said they would give this notification dated April 3rd, marked plaintiff's Exhibit 6, if the bank would release the \$700.00, which they would then pay upon that date?

A. Yes, sir.

Mr. THOMAS: That is very leading.

Mr. HUNT: It is subject to that objection but that is the testimony.

Q. You will please state whether or not you know

that the Lewis A. Hicks Company knew that you had unpaid laborers and material-men on account of the work done by you under that sub-contract?

A. Why, I don't know whether or not they knew of all the outstanding accounts we had, but I know that they had received letters from some of them—several of our creditors telling them of the amounts that were owing to them by us.

Q. Those letters received from your creditors by the Lewis A. Hicks Company, and the notification of the amounts due, did they constitute the sum of \$700.00 which you spoke of just a few moments ago, or was it in addition to the \$700?

A. Well, the ones I have in mind are two outside of the \$700.00. That \$700.00 was made up of several invoices that I took down there and showed Mr. Katz how I intended to disburse this \$700.00, and had a list of the names and amounts.

Q. Have you a copy of that invoice with you?

A. No, I don't think I have. I have a list with me—I don't know that I have it here now—that Mr. Katz made of these amounts, and the form of receipt that he wanted me to have each party sign.

Q. Do you know what other accounts—you said you had in mind two others who had filed claims beyond the \$700.00. Do you know who they were?

A. Mr. Wagner of the Hicks Company had told me that the Columbia Contract Company and the Atlas Mixed Mortar Company had both written him, notifying him that we were back in our accounts with

them.

Q. Do you know of any others, Mr. Sullivan?

A. There may have been others. I had those two in mind.

Q. Is the Sullivan Fireproof Partition Company now financially unable to meet its outstanding obligations?

A. Yes, sir.

Q. And was it on or about the month of May, 1912, unable to meet its financial obligations?

A. Yes, it hadn't the ready money to take them up.

Q. Has it withdrawn from business in this state?

A. Yes, sir.

Q. Has it ever complied with the laws of this state relative to foreign corporations?

A. No, sir.

Q. It has no resident attorney in fact?

A. No, sir, none that I am aware of.

Mr. HUNT: That is all for the present if I may recall Mr. Sullivan later.

#### Cross Examination.

#### Questions by Mr. THOMAS:

Mr. Sullivan, you say that the Sullivan Fireproof Partition Company is insolvent at this time?

A. Yes, sir, I think it would be considered so.

Q. And that it was unable to meet its financial obligations on the 15th day of May, 1912?

A. Yes, sir, it had no money with which to pay

them.

Q. Was it in any better position on the 3rd day of April, 1912, to pay its obligations than it was on the 15th day of May, 1912?

A. No, I don't think it would be considered so.

Q. You had no more assets to pay your obligations with on the 3rd day of April, 1912, than you had on the 15th day of May, 1912?

A. No, sir.

Q. What was the condition of your assets along in the early part of June, 1912?—Any different from what they were on the 15th day of May, 1912?

A. No, they were about in the same shape.

Q. Be about the same. Then as a matter of fact, Mr. Sullivan, the Sullivan Fireproof Partition Company from the 3rd day of April on was in the same, practically the same financial condition, that is, we will say, up until the middle of June?

A. Yes, it had no more or no less during that period.

Q. Now, Mr. Sullivan, when this \$700.00 release was obtained, what was done by you down at the bank? In other words, I am trying to find out what was done in connection with this \$700.00.

A. Why, I took Mr. Katz' letter to Mr. Howard and asked him whether or not that fulfilled his requirements and he said that it did. I left the letter with him and told Mr. Katz that Mr. Howard was agreeable that he should make a check for Ladd & Tilton for \$700.00 to cover these accounts, and Mr.



Katz gave me their check payable to Ladd & Tilton, and I took it over there to Mr. Howard, and it was passed to our credit.

Q. You checked out against it?

A. We checked out against it and turned in the receipts to Mr. Katz the next day.

Q. Now, you had some talk with Mr. Howard at that time as to the reason for wanting the release of this \$700, didn't you?

A. Yes, sir.

Q. And what did you tell him that you wanted the \$700 for?

A. To take care of small accounts that would aggregate about that amount.

Q. Did you tell him that they were pressing claims?

A. I don't recall whether I did or not.

Q. Did you have any talk with him at that time about the claims?

A. About what time?

Q. About claims due from your company to material men, etc., in connection with the building?

A. About what time was that?

Q. About the time that this letter was given, April 3, 1912.

A. I don't recall whether Mr. Howard and I talked very much about it. I explained my request for this \$700 and showed him that it was over and above the amount that we owed the bank, and that I would like to have these bills paid, but I don't remember wheth-

er or not we talked of the other accounts or not.

Q. Did you ever have any talk with Mr. Howard relating to a chattel mortgage to secure your indebtedness to the bank?

A. Well, I can't remember definitely about that.

Q. Is it your recollection that you had?

A. Well, it seems to me that at some time, in one of my talks with one of the officers of the bank, I suggested something about our machinery not being covered with any—not being any incumbrance, and a chattel mortgage was mentioned in some way, but I can't recall it definitely.

Q. You don't have any idea about when that was?

A. No, sir, I have not.

Q. Now Mr. Howard at the time of this letter, April 3, 1912, was he talking about your paying off your claim at that time to the bank?

A. I don't think so. I went to him after I had a talk with Mr. Katz to find out just what he wanted in the way of this letter.

Q. He knew then at that time, Mr. Sullivan, though that your contract had been completed, didn't he?

A. Yes, I told him.

Q. And he knew at the time this letter was written that there apparently was unpaid on the contract \$4300.00.

A. No, I don't think anyone knew what the amount was.

Q. Well, it specified in the letter.

A. Oh, the amount that was due us?

Q. Yes.

A. I thought you meant the amount we were owing.

Q. No, I meant the amount due to you.

A. Yes, that was determined on by Mr. Katz and myself.

Q. And Mr. Howard knew that of course when this letter was handed him?

A. Yes, sir.

Q. And knew that your contract was completed?

A. Yes, sir.

Q. And knew that you owed them some \$3600?

A. Yes, sir.

Q. Now, didn't you have some talk at that time as to your condition, as to whether you were owing anything on the building, or whether you would be able to pay or not?

A. As near as I can remember we didn't have—or didn't go into those matters until later on; after the time in that letter had expired, when Mr. Howard explained that he hadn't received the money under it and—

Q. (interrupting) That was about May 1st then?

A. Some time after that, yes, sir.

Q. Now, didn't you attempt, at the instance of Mr. Howard, to obtain from Mr. Katz a letter directed to the bank itself in connection with this order—in connection with this turning over of \$700.00?

A. Did I not attempt to get one, you say?

Q. Yes. Didn't Mr. Howard and you request Mr. Katz to give a letter to the Ladd & Tilton Bank, as to the amount due?

A. I don't know whether it was requested to be directed to the bank or to us. Mr. Howard told Mr. Katz, I believe, and Mr. Howard also told me what he would require; it was in the form of a letter to them or to us. I don't remember whether or not it was stated to whom it was to be directed.

Q. Didn't Mr. Katz decline to give any letter to the bank in connection with any amount that might accrue to you people?

A. I believe he—I don't recall as to that, but I know that Mr. Katz hesitated to draw such a letter.

Q. And at this time there was talk about the expiration of the lien period, wasn't there?

A. No, sir, I never spoke of liens with Mr. Katz or any one else in his office.

Q. You didn't hear Mr. Katz and Mr. Howard talk about the possible expiration of the lien period?

A. No, sir, I wasn't there.

Q. Let me ask you this: Didn't either you prepare or didn't Mr. Howard prepare a letter to be submitted to Mr. Katz, and which was submitted to him, which he declined to sign, and he prepared one himself?

A. Yes Mr. Katz told me of this talk with Mr. Howard and of what Mr. Howard wanted. He hesitated to write the letter, and I think I told him that I would write a letter including what I thought Mr.

Howard wanted, and as near as I remember, I did write a letter, a form to cover what I thought the bank would want.

Q. So you wrote the letter?

A. No, sir, I did not. I wrote a form, a different form altogether.

Q. Yes, that is what I referred to.

A. I didn't write the letter, though, the one—

Q. (interrupting) I am not talking about the one that was signed, Mr. Sullivan. I am talking about the other one that Mr. Katz refused to sign. Did you write that or did Mr. Howard write it, or who wrote it?

A. No, I wrote it.

Q. And he declined to sign that?

A. No, he didn't decline to sign it. He wrote one of his own.

Q. Why didn't he sign the letter that you had written?

A. Well, as nearly as I remember, it was merely a—I don't know that it was fit to be signed. It was a form to cover what I thought Mr. Howard wanted, as Mr. Katz didn't seem to understand what he did want.

Q. Wasn't this the object, Mr. Sullivan: Mr. Katz didn't want to put his company in a position of binding themselves to pay the bank any specific sum? Wasn't that his whole object in attempting to write this?

A. I don't know what his object was.



Q. Was there any talk about that?

A. Well, he did say something about not knowing whether or not it would be right for him to—

Mr. HUNT: Just a moment: If your Honor please, unless Mr. Howard or some officer of the bank was present, this conversation would be immaterial. I want everything in and open.

COURT: I think the circumstances under which the letter was written are pertinent.

Mr. HUNT: It is, but unless this conversation, where Mr. Katz says he was restricting his liability, was in the presence of the bank officers, I doubt its materiality.

Mr. THOMAS: There was testimony on behalf of Mr. Howard in connection with the lien period, and it seems to me it is pertinent to find out what the parties' intention was.

Mr. HUNT: Save an exception.

A. What is the question?

Question and answer read as follows: "Wasn't this the object, Mr. Sullivan: Mr. Katz didn't want to put his company in a position of binding themselves to pay the bank any specific sum? Wasn't that his whole object in attempting to write this? A. I don't know what his object was. Q. Was there any talk about that? A. Well, he did say something about not knowing whether or not it would be right for him to—"

Q. That is, you were about to say that he was hesitating about writing any letter. Is that the idea?

A. Well, no. He spoke as if he thought it were a matter that should be handled by some one else of his company, but I believe at the time he was in charge of the office.

Q. Do you remember, Mr. Sullivan, how the amount of the unpaid claims of the various material-men furnishing stuff to you upon this building is—what the amount is?

A. Somewhere about \$4500.00.

Q. About \$4500.00. Have you, Mr. Sullivan, your books here indicating the amounts that are due to the various claimants?

A. Yes.

Q. I will ask you to produce them. (Witness gets books.) What book is that you have, Mr. Sullivan?

A. I call it a ledger.

Q. Call it a ledger. Who made the entries in that book?

A. I did.

Q. So that the entries therein are from your own personal knowledge?

A. Yes, sir.

Q. And they were not entered by anybody else?

A. No, sir.

Q. Is there anything in there, Mr. Sullivan, in connection with the claim of Roeblings's Sons Company against the Sullivan Fireproof Partition Company?

A. Yes, sir.

Q. Will you state what the Roeblings' Sons Com-

pany furnished to you, if anything, that caused that charge to be put in that book?

Mr. HUNT: I desire at this time to enter an objection to this line of testimony. In the first place, it isn't proper cross examination. If Mr. Thomas wishes the testimony, he should make him his own witness for that purpose, for it isn't proper cross examination. But more properly, I don't think it is material to any issue made in this case, what the amounts are, and what they were incurred for. The fact is he has pleaded there was due from the Sullivan Company about \$4500, which he is attempting to offset on the amount due Sullivan for his work. Now the issue as to that can be determined without going into the ledger and entries made on the books for work and labor performed, and to what people. The chief examination, as I intended to make it, only went to the point, Did Lewis A. Hicks have knowledge that there were unpaid creditors of Sullivan at the time of the notification of April 3rd. The witness testified that they did have that knowledge. Now, I consider the only material point that can be asked on cross examination—did they or did they not have that knowledge.

COURT: There is an issue in this record, as I understand it, as to the amount due these labor and material men on the Sullivan contract.

Mr. HUNT: I don't believe there is. I didn't intend there should be such a one, for this reason: Lewis A. Hicks Company hasn't got to pay a cent of

money out under this work. If they don't have to pay there is no issue upon that, because as the case now stands before your Honor, Sullivan entered into a contract with Hicks, and he gave a bond with good and sufficient surety to pay—

COURT: That isn't material. The answer sets up certain things. Now, do you deny in the reply or admit it?

Mr. HUNT: Deny in the reply.

COURT: Counsel has to prove it.

Mr. HUNT: But can he prove on cross-examination of a witness who hasn't testified to it, in chief?

COURT: Can't do it on cross examination. (To Mr. Thomas.) If you want to make him your own witness, you can do that.

Mr. THOMAS: I suppose when it comes to our case, that is the proper time to do that.

COURT: It is not proper cross examination, of course.

Mr. THOMAS: The only point we had in the matter was Mr. Sullivan lives in Salt Lake, and we were not absolutely sure what we would be able to prove by him, and we have asked all these claimants to come here and prove these claims, and they are sitting around, waiting, and if counsel would—

COURT: You can make him your own witness now, if you desire to do so and put that testimony in.

Mr. THOMAS: Then we had better do that, to save these people coming in. We will make him our witness.

Direct Examination.

Questions by Mr. THOMAS:

What were the things that Roebling & Company furnished to you in connection?

A. There was re-inforcing wire.

Mr. HUNT: I wish to enter another objection to this testimony at this time, for the reason that it is incompetent, immaterial and irrelevant. I believe the rule of law is that parties cannot make an issue of a irrelevant matter. I might have set forth in my complaint that the Battle of Waterloo occurred at a certain date, and Mr. Thomas deny it, and that would make no difference in the issues of this case. Whether or not it is an issue is determined by whether or not it is material. I didn't move to strike the answer because it contained certain things I wanted in there at the time of this trial. If it is immaterial, you can't make it material by denying it. The point in this case, to my mind is this: Ladd & Tilton Bank has an assignment, given and accepted by the Hicks Company

COURT: Taken subject to the contract—

Mr. HUNT: Taken subject to the contract, but it is shown they had no knowledge of the contract.

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COURT: I will let the testimony in, subject to your objection.

Q. (Mr. THOMAS) Now, what do you say the stuff was that Roebling Sons Company furnished?

A. It was reinforcing wire.



Q. Where was that used?

A. It was used in making these blocks.

Q. Blocks for what?

A. Partition blocks.

Q. Partition blocks. Where were the partition blocks used?

A. In the partition work at the Lincoln High School, and other places as well.

Q. What was the amount of the claim of Rocklings Sons?

A. It totalled \$214.99.

Q. Has that claim been paid?

A. Yes, sir.

Q. Who paid it?

A. Hicks Company.

Q. I will call your attention to the claim of the Acme Cement Plaster Company. Will you look at the book and see if there is anything there in connection with the Acme Cement Plaster Company?

A. Yes, sir. The book shows we are owing them \$836.55.

Q. What was that for?

A. That was for plaster.

Q. Where was the plaster used?

A. It was used in making blocks.

Q. And those blocks were used in the Lincoln High School?

A. Lincoln High School Building.

Q. Has this sum of \$836.55 been paid?

A. No, sir.

Q. That is still due the Acme Cement Plaster Company?

A. Yes, sir.

Mr. HUNT: Just for the purpose of the record. I don't believe that this is a defense now as to this plaster company unless he shows that Hicks Company has paid them. He hasn't suffered any damage yet.

COURT: He claims he is liable under his bond and under the contract.

Mr. THOMAS: And under the statute.

Mr. HUNT: Here is a contingent claim, we don't know the merit of it. Let him prove what he has actually suffered in damage; that is a different proposition. It has been held that the payment of claims is a complete defense, but non-payment of claims is immaterial and cannot be offered.

COURT: I will consider that on the merits of the case when the testimony is all in.

Mr. HUNT: Save an exception.

Q. That was for material furnished and used in the Lincoln High School Building?

A. Yes, sir.

Q. Now, will you refer to the Atlas Mixed Mortar Company.

A. We are owing them \$121.30.

Q. What for?

A. For sand and hauling.

Q. In what connection?

A. The Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention to the name of the Portland Quarry Company.

A. We are owing them \$134.00 for hauling away rubbish from the Lincoln High School.

Q. Hauling rubbish away from the Lincoln High School?

A. Yes, sir.

Q. In connection with your contract there?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the Columbia Contract Company.

A. We are owing them \$114.08.

Q. For what?

A. For sand furnished to the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention to the name of the Columbia Hardware Company.

A. We owe them \$30.22, as near as I was able to figure it out on the Lincoln High School. We bought hardware from different firms, and a part was delivered to our place on the east side, but as near as I could segregate it, we owe them \$30.22 on the High School.

Q. Do you happen to know the full amount you owe the Columbia Hardware Company?

A. We owe them in addition to the \$30.22—we

owe them \$72.33.

Q. But that is not connected with these?

A. No connection with the school.

Q. Has that \$30.22 been paid?

A. No, sir.

Q. I call your attention to the claim of the East Side Transfer Company.

A. We owe them \$75.65.

Q. What is that for?

A. For hauling.

Q. Hauling of what?

A. Hauling blocks.

Q. To the Lincoln High School Building?

A. To the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of E. Hippeley.

A. That is still owing, \$32.35.

Q. What was that for?

A. That was for the rent of motors and some repair work, some wiring.

Q. In the Lincoln High School Building?

A. In the Lincoln High School, yes, sir, incidental to this contract.

Q. Incidental to this contract. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Northwest Door Co.

A. We are owing them \$51.05.

Q. What was that for?

A. For some wood parts for our machinery as used at the Lincoln High School.

Q. What was that? Just explain so we can understand.

A. They were wood cores that are used in the operation of making these blocks. They usually last the lifetime of one job or so.

Q. These blocks were hollow; is that the idea?

A. They were hollow and these wood cores were used for making that hollow part; after these blocks are molded in a machine, they are taken out and the wood cores were knocked out.

Q. Those are necessary things in the construction of these blocks?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Oregon Transfer Company?

A. We are owing them \$72.75.

Q. What was that for?

A. For hauling at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Portland Machinery Company.

A. We are owing them \$47.85. That is for—I think it was a fan and some dry kiln trucks used in



the operation of drying the blocks.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Portland Railway, Light & Power Company.

A. We owe them \$26.80 for power, and \$26.10 for lights at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of George B. Rate.

A. We owe them \$13.75 for some plaster hair.

Q. Plaster hair?

A. Yes, sir.

Q. Was that used at the Lincoln High School?

A. Yes, sir. I think it was; as near as I can tell it was.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Union Oil Company.

A. We are owing them \$78.25.

Q. What was that for?

A. That is for coal oil furnished at the Lincoln High School.

Q. How was it used?

A. It was used as a sort of lubricant in knocking out these cores.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Western Lime & Plaster Company.

A. We owe them \$1285.91.

Q. What was that for?

A. For plaster.

Q. Used at the Lincoln High School Building?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of Wright & Branch.

A. Wright & Branch—we owe them a balance of \$1400.00.

Q. A balance of \$1400.00?

A. Yes, sir.

Q. For what?

A. It is a balance due them on a sub-contract that they took from us for erecting partitions.

Q. In the Lincoln High School Building?

A. In the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the United States Steel Products Company.

A. We owe a balance of \$150.00.

Q. What was that for?

A. That is for wiring—wire—reinforcing wire.

Q. That is used in these blocks? A small wire?

A. A small chicken wire.

Q. Used as a reinforcement?

A. Yes, sir.

Q. That was used in these blocks used in the Lincoln High School?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.

Q. I will ask you, Mr. Sullivan, whether you are familiar with the value of these materials furnished and the labor performed in connection therewith, as to all of these items that you have just testified to?

A. Am I familiar with the values?

Q. Yes, with the values that you should have paid for these materials that were furnished you, and for the labor performed. In other words, whether these amounts are reasonable for the materials furnished and the labor performed?

A. Yes, sir, there were no differences between us on prices of any of the materials.

Q. I will ask you then if these amounts you have specified were the reasonable value for the various materials furnished, and the labor performed in connection therewith?

A. Yes, sir.

Q. What is the aggregate of them, do you know?

A. I have it in with some others here. I think it is \$4496 and some cents.

Q. Yes, \$4496. And that you consider the reasonable value of this material furnished and—

A. Yes, sir.

Q. (continuing) and labor performed that you

have testified to; materials and labor that you were required to furnish under your contract with the Hicks Company?

A. Yes, the most of it. There was a considerable amount of these moneys expended that, at the time the contract was signed, were not supposed to have been expended, brought about through the negligence of the Hicks Company in delaying that building. We were supposed to have gone on there—it was the first of July, and the building was allowed to drag, through non-delivery of steel I believe was the excuse—anyway so that we didn't get on there until about the 1st of October, which made it necessary for use to expend all this money, in drying all this material, which otherwise wouldn't have been necessary.

Q. But these materials that were used though were the materials that you would naturally have to furnish in connection with the contract that you entered into?

A. Naturally under the conditions as we found them when we started, but not when we signed the contract.

Q. What do you mean? Do you mean you had to furnish additional materials to go in up there you wouldn't have furnished?

A. Yes, sir.

Q. What material?

A. You see when we figured this building, Mr. Hicks and myself, in San Francisco, he told me that the building would be ready for us early in the sum-

mer, which made it possible for us to figure on air drying our material, making it and drying it in the open, which would have done away with running steam dry kilns, but the building didn't come along, as it happened, so we could go on it until the 1st of October, and it made it necessary for us to run all winter, while it was pretty wet.

Q. That was only a question of time, wasn't it? You didn't have to use any more material, did you?

A. No, but we had to use a whole lot more heat and building a dry kiln.

Q. But there is nothing in this in connection with a dry kiln.

A. Yes, sir.

Q. What is it?

A. Well, there is the trucks and—well there is in this—I don't know that many of these items here referred to it, but a great many that were paid; we had to pay out in the neighborhood of a thousand dollars for fuel that otherwise wouldn't have been expended.

Q. None of those in these unpaid items?

A. Those are all paid.

Q. What I am getting at is the materials that have gone in here are in quantity the same under any conditions, are they not?

A. Oh, yes.

Q. You didn't have to use any more wire, and you didn't have to use any more plaster, or sand, or hair, or anything like that?



A. No.

Mr. THOMAS: I think that is all.

Cross Examination.

Questions by Mr. HUNT:

Will you just turn to that book, the pages you had there, Mr. Sullivan, please.

A. Yes, sir.

Q. The Acme Cement Plaster Company, you testified for certain material. What was it? I couldn't understand.

A. That was plaster.

Q. And what was the Atlas Mixed Mortar Company?

A. That was sand and hauling.

Q. That was sand and hauling?

A. Yes, sir.

Q. Can you segregate the two items?

A. Well, hardly, I should say about half and half.

Q. About half and half?

A. That is a guess, though.

Q. And the Portland Quarry Company.

A. That was hauling the rubbish away from the building, broken blocks and the refuse from the floors.

Q. And the Columbia Contract Company?

A. That was for sand.

Q. Any transportation charges in that?

A. What? Hauling to the building, do you mean?

Q. Did they have any transportation charges in this amount you have here?

A. That included the cost of the sand delivered at the High School.

Q. And the Columbia Hardware Company?

A. Why for various forms of hardware we bought from them. Used tools of various kinds.

Q. Tools?

A. Tools, and—oh parts of machinery and parts of boilers and such as that.

Q. That was a part of your permanent equipment and plant, was it not.

A. Part of it was, yes.

Q. Did any part of that enter into the construction of the building?

A. No, the tools were only used in carrying out the work of construction, and the parts of the boilers were used in the boilers in the drying of material.

Q. Who purchased from the Columbia Hardware Company?

A. From them?

Q. Yes.

A. There was a foreman.

Q. I mean was it the Sullivan Fireproof Partition Company that purchased from them?

A. Yes, sir.

Q. Now, you spoke of E. Hippeley, \$32.35, rent of a motor. What was that motor used for?

A. It was used in driving the mixer; we had a big tub mixer with which we mixed up the material used in making the blocks. This motor was used in driving that mixer.

Q. You rented a motor from him?

A. Yes, sir.

Q. The Northwest Door Company. You spoke of furnishing wood as a part of the machinery. I didn't understand what that was.

A. They made us a number of wood cores that were used in forming the hollow part of these blocks. We would set these cores down in the machine, and fill the machine up with plaster; then when it hardened we drove these cores out and have the hollow part of the block in their place.

Q. That was a part of the manufacture of the block, was it not?

A. Yes, a part of the process of making the block.

Q. Now the Oregon Transfer Company was for hauling?

A. Hauling, yes.

Q. Hauling the blocks?

A. Hauling the blocks to the building.

Q. Hauling the wood blocks or the plaster blocks?

A. No, the plaster blocks?

Q. The Portland Machinery Company I believe you said was for dry kiln trucks.

A. Dry kiln trucks, and I think for a fan, if I remember right.

Q. These trucks, just common trucks to put stuff on to carry around?

A. They call it a dry kiln truck; it is used as a part of a car that goes into the dry kiln to carry blocks.

Q. And the fan, what is that?

A. I am not so certain whether their bill included that fan, or whether or not we paid for it. We had a fan and bought it from them. I can't recall whether or not it was paid for.

Q. Then if this bill of \$47.85 does not include the fan, it is all for trucks?

A. Yes, sir, I think that is all we bought from them.

Q. Where are those trucks now?

A. They are over here in a basement where part of this machinery is.

Q. Part of your plant—part of your equipment, are they?

A. They are now, yes.

Q. They were then?

A. They were used as part of the equipment, yes.

Q. Now, the Portland Light & Power Company has a bill of \$52.90 for power and light. What was that power furnished for?

A. To drive the motor.

Q. To drive the motor?

A. Yes, sir.

Q. What motor—the Hippeley motor?

A. Yes, the one that runs the mixer. And also for driving a fan in the dry kiln.

Q. And the light was what?

A. Lights used around the place where we were working.

Q. But this motor, or this power was to drive a motor used in the manufacture of the blocks, was it

not?

A. Yes, sir.

Q. George B. Rate, he furnished plaster hair, is that it?

A. Yes, sir.

Q. Plaster hair?

A. Yes, sir.

Q. Wright & Branch had a sub-contract for placing the partitions?

A. For placing the partitions.

Q. And the United States Steel Products Company for reinforcing?

A. For wire.

Q. Reinforcing wire?

A. Yes.

Q. Is there any man on this list, Mr. Sullivan, who furnished any material directly that went into the building, or wasn't the material that was furnished, furnished the Sullivan Fireproof Partition Company to be afterwards manufactured into stuff that went into the building?

A. The only thing that actually went into the construction of this building as far as we were concerned were these blocks.

Q. That is the thing you manufacture?

A. Yes, sir.

Q. That is the thing you agree to furnish in your contract?

A. We agreed to furnish and erect them.

Q. And erect them?



A. Yes, sir.

Q. And the stuff you speak of here was sold to your company individually in the course of your manufacture?

A. This was all sold to us to be used in making these blocks—I think, without going over each item.

Q. And do you know whether or not any material was furnished by these parties that went into blocks, which blocks were placed in any other buildings and other places, other than the Lincoln High School?

A. Yes, we had a surplus number of blocks from the school that were taken away and used on the Smith Hotel Building.

Q. Where is that?

A. I think called it Sixth and Main, if I remember right.

Q. That is in the City of Portland?

A. City of Portland, yes, sir.

Q. About how many was that, do you know?

A. Probably about ten thousand feet.

Q. About ten thousand feet?

A. Yes, sir.

Q. And I want to be perfectly sure that a portion of the material that you have testified to here went into these blocks that went into that Hotel at Sixth and Main.

A. Well, how we come to have these, in making blocks that we used in this school, in our machines we get three of the size used in the school and one smaller size, a three inch block used in ordinary par-

titions, and we had no use at the school for any number of these three inch, such as we would have in making a six inch. We had to provide a place of putting them; it was considered sort of a waste, that is, as far as the school was concerned, so we got this Smith job and hauled a considerable number there, but we were afterwards stopped from doing that by the Hicks Company and the architects, so that we finished up delivering to that building from our place on the East Side.

Q. Now, where was your plant on the East Side?

A. At East Water and Morrison.

Q. At East Water and Morrison. Where was this material delivered?

A. Material delivered to all these different places, but that I have mentioned was all delivered to the Lincoln High School as far as I checked them off.

Q. Was delivered to the Lincoln High School?

A. Yes, sir.

Q. Did you have a manufacturing plant there?

A. Afterwards—Oh, at the Lincoln High School?

Q. Yes.

A. Yes, we made our material right in the school building in the basement.

Q. I see. Then the stuff you have mentioned here was delivered at the High School?

A. Delivered at the High School.

Q. And there manufactured by you in your own plant?

A. Into blocks.

Q. Into blocks?

A. Yes, sir. We owe a number of these people, these same people other accounts, that I haven't considered as being included in the High School material—delivered at the East Side.

Q. How have you segregated it?

A. I mean I have only included in there materials that I knew had gone to the High School; materials that were delivered to us by these different people to our place on the East Side, I haven't included in these amounts. That is, tried to keep them separate as near as I could.

Q. But you are not sure that they are separate, are you?

A. Fairly sure, yes. I might have overlooked one or two.

Q. Now you say, you testified that the Roebblings' Sons Company's claim is the only one that has been paid.

A. Yes, of those we have mentioned.

Q. Do you know that that was paid?

A. Well, Hicks Company told me that it was.

Q. Then you are simply testifying to what they told you?

A. Yes, Roebbling never told me.

Q. You don't know of your own knowledge it was paid, do you?

A. Well, I feel pretty well satisfied that it was.

Q. Simply from what they told you, though?

A. Simply from what I heard from them—not

that you had these accounts?

A. I don't remember that.

Q. When you say then that you thought that Mr. Howard knew of several large accounts, you are just guessing from inference?

A. It was an assumption at the time, yes.

Q. An assumption which was not warranted by any statement of yours or Hicks?

A. Not that I remember of now.

Q. You wouldn't say positive would you, Mr. Sullivan, that you offered Ladd & Tilton Bank a chattel mortgage?

A. No, I wouldn't. I have tried to recall that, but I don't remember how that came up or whether it came up through Mr. Howard and myself or through some one else.

Q. Might have been some other creditors?

A. Very likely might have been.

Q. In the face of Mr. Howard's positive testimony no chattel mortgage was offered Ladd & Tilton Bank, would you state now it was?

A. No, sir, I would state now it wasn't if Mr. Howard says so. I know that at some time or other a chattel mortgage was spoke of with some one, but I can't say positively it was Mr. Howard or any officer of the bank.

Q. Did the bank request that that notification dated April 3, 1912, be addressed to itself, or did it just simply say that a notification be given of a certain amount due and when it would be paid?

A. I think that was the way the request was made; that a letter be written stating the amount due us, and when it would be paid.

Q. Did Mr. Katz of the Hicks Company know that that letter was going to be delivered to Ladd & Tilton Bank?

A. Yes, sir.

Q. And did he know that it was upon the strength of that letter and the information therein contained that Ladd & Tilton Bank was going to release \$700.00?

A. Yes, sir.

Q. How many of these claims that you have testified about did the Lewis A. Hicks Company, or any of its agents, know at the time of April 3, 1912—that you know they knew of?

A. Well, at different times when I was in the office, Mr. Wagner or Mr. Katz would speak to me about having received letters from different people. Now, I remember distinctly him telling me that he had heard from the Columbia Contract Company and the Acme Mixed Mortar Company and one day gave me a letter or showed me a letter from Mr. Thomas of the School Board calling attention to an account that had been presented to them; it was one of the plaster accounts, I don't remember whether the Western Lime & Plaster or the Acme Cement Plaster.

Q. One of the big plaster contracts?

A. Yes, sir.

Q. Did you ever generally inform the Hicks Com-



pany prior to April 3, 1912, that you were in financial difficulties?

A. Oh, no. Mr. Wagner and I spoke of it. I think he knew fairly well what condition we were in about that time.

Redirect Examination.

Questions by Mr. THOMAS:

You used an expression, "10,000 feet" in connection with blocks a while ago. Having that in mind how many feet went into the Lincoln High School Building?

A. I think it was 130,000 feet.

Q. That would make 140,000 feet that you constructed altogether up there?

A. Not up there, no, sir. A part of these were later made at the East Side but delivered to the High School.

Q. You mean a part of the 10,000?

A. No, a part of the 130,000. You see we had to get out of the building because the place where we were working had to be finished and we were in the way, and we took our machinery over to the East Side, and started to making blocks there to finish the school as well as to take care of any other work we should get, and we hauled over several loads from the East Side to the school to make up the 130,000.

Q. But the 130,000 feet went into the building?

A. I believe that is the amount we determined on, yes, sir.

## Recross Examination.

Questions by Mr. HUNT:

A part of this hauling expense you testified to is hauling from the East Side?

A. I don't remember whether I included that in the amount in the school, or whether I left it on open account. I have two open accounts with the Oregon Transfer and the East Side Transfer. I couldn't say whether or not I included that.

Q. Mr. Sullivan, was any of the material at all which was furnished to you to create into plaster blocks, furnished to any other place—other than the premises of the Lincoln High School?

A. That was used in making blocks to be put in the High School?

Q. Yes.

A. Yes, it was delivered over on the East Side. Over at East Water and Morrison Streets.

Witness excused.

Mr. HUNT: If your Honor please, I ordered a certified copy of complaint and record in a case filed in the Circuit Court of this state, entitled *Lewis A. Hicks Company vs. Sullivan Fireproof Partition Company and the United States Fidelity & Guaranty Company*, and I have subpoenaed the Deputy County Clerk to appear and identify the record. The purpose of that is—I have pleaded in my reply that the Hicks Company made an election as between these people from whom they are going to ask this money, and I want

the introduction of that record to show that election. It is not here yet. If we may rest with permission to offer that later, I will now do so.

Plaintiff rests.

Mr. THOMAS: I desire to offer in evidence contract between the Lewis A. Hicks Company and School District No. 1. I offer it in this informal way for the reason that the pleadings admit the execution of the contract.

Mr. HUNT: We wish to object as incompetent, immaterial and irrelevant and not an issue in this case.

COURT: It will be admitted.

Mr. HUNT: Save an exception.

Marked Defense Exhibit A.

Mr. THOMAS: I don't attempt to prove any of the pleadings. The defendant admits paragraph 6: "Admits that in connection with said contract the above named defendant executed its bond as principal in favor of said School District No. 1 with the Pacific Coast Casualty Company as surety thereon, but denies any knowledge or information as to whether or not the bond set forth in the said paragraph 6 is a true copy of said bond and the whole thereof.

Mr. HUNT: I admit that. My only point is you can't make an issue of an immaterial fact.

Mr. THOMAS: I desire to offer in evidence the bond executed by the Lewis A. Hicks Company and the Pacific Coast Casualty Company to School District No. 1. In the pleadings the execution of the

bond is admitted but they deny any knowledge or information as to whether or not it is the bond set forth in paragraph 6. I offer this in evidence at this time and ask leave to substitute, as the School District is desirous of keeping this bond. I ask leave to substitute a copy.

Mr. HUNT: Same objection.

COURT: This is a copy of the original—copied in the pleadings?

Mr. THOMAS: Yes.

COURT: Why not admit that is a correct copy?

Mr. HUNT: That is all right.

COURT: It is not necessary to encumber the record.

Mr. THOMAS: Very well.

FRED A. KATZ, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. HUMPHREYS:

Mr. Katz, did you write a letter on behalf of the Lewis A. Hicks Company to the Sullivan Fireproof Partition Company, on April 3, 1812?

A. I did.

Q. I hand you Plaintiff's Exhibit 6 and ask you to state whether you have seen that letter.

A. Yes, this is it.

Q. That is the letter you wrote?

A. Yes, sir.

Q. Just tell us in detail the circumstances leading

up to your writing that letter.

A. Why, Mr. Sullivan came in the office one day and wanted a letter to the bank saying how much money was due him and when it would be paid. I told him I wouldn't give it to him; didn't want to lay the Hicks Company liable for any moneys, and he went away and came in the next day and asked me for it. He said he wanted \$700.00, at least about \$700.00 to pay some small creditors, and I again refused. Mr. Sullivan left and then he must have gone to see Mr. Howard, as he came back and told me "if you will go and see Mr. Howard, it will be all right." I went over and seen Mr. Howard and told him the circumstances, and Mr. Howard wanted us to write a letter to him.

Q. When you say you told him the circumstances, what do you mean by that?

A. I told him he had about \$4300 or \$4400.00, I couldn't say exactly, coming to him. He owed considerable money on the job, I couldn't say exactly how much, and he wanted six or seven hundred dollars to pay some small bills.

Mr. HUNT: Who was that conversation with?

Q. Mr. Howard. Was anything said at that time about the period for mechanic's lien?

A. He wanted a letter and I said I couldn't give a letter.

Q. You say he wanted a letter?

A. Mr. Howard.

Q. Mr. Howard wanted a letter?



A. Yes, sir.

Q. Yes, and—

A. (interrupting) And I told him I couldn't give him a letter; there was certain bills outstanding and I didn't know who was going to lien on the job, or not. So he wouldn't release—he told me he wouldn't release the \$700. I says "All right." Then I went back to the office and Mr. Sullivan came in the next day, and he wanted a letter in the worst way, telling me that Sullivan's creditors were pressing him, so I says: "What kind of a letter do you want?" He said, so I rang for the stenographer and she came in and sat down and he dictated a letter, and I said no, I wouldn't sign that, so, "well," he says, "give me something." I says "I will give you something that won't incriminate the Hicks Company. I won't address it to the bank, but will address you a letter" and I wrote this to him. That is all there was to it.

Q. What did you mean by incriminating the Hicks Company?

A. I didn't want to lay them liable for any money.

Q. Did you and Mr. Howard discuss the effect of any liens on the amount that would be due from the Hicks Company?

A. Well, I gave him to understand that the liens would have to come first if there were any filed, that is would have to be paid first.

Q. What is your position with the Lewis A. Hicks Company—what was it at that time?

A. Cashier.

Mr. HUNT: You don't mean to say you deny his authority to give this?

Mr. HUMPHREYS: No, no, no question about that at all.

Cross Examination.

Questions by Mr. HUNT:

Mr. Katz, when was this conversation with Mr. Howard that you speak of?

A. Well, that order was signed on April 3. It must have been April 1st or April 2nd. I couldn't state positively.

Q. Where did the conversation take place?

A. In the Ladd & Tilton Bank.

Q. How did you happen to go there?

A. Beg pardon?

Q. How did you happen to go to Ladd & Tilton Bank?

A. Mr. Sullivan requested me to go and tell him—and see him, and said I could get the seven hundred released for his creditors.

Q. You knew that he had this seven hundred that he wanted to pay off right away, didn't you?

A. I don't know whether he said seven hundred exactly, but it was approximately that amount that he wanted to pay. They were pressing him very hard.

Q. You say it was not your intention to make any binding obligation on the Hicks Company by writing that letter. That is what you said, isn't it?

A. Yes.

Q. But you did state that the contract had been completed, didn't you?

A. Yes, sir.

Q. You knew that it was completed?

A. Yes, sir.

Q. And you said that there was a balance due of \$4300.00, didn't you?

A. Yes, sir.

Q. And you said it would be paid on or about May 1st?

A. Yes.

Q. You made no reservations about liens, as you call it, or any other labor claim, did you?

A. No.

Mr. THOMAS: That doesn't say will be paid; says will be due.

Q. Did you know, Mr. Katz, that Sullivan had other unpaid creditors—other than those represented in this \$700?

A. Yes, sir.

Q. At the time of this notification of April 3rd?

A. Yes, sir.

Q. Did you know that they had priority and would have to be paid?

A. Did I know what?

Q. That they had priority and would have to be paid?

A. Prior orders?

Q. Priority. Didn't you know they were first in the law and would have to be paid before anybody

Bank but to Mr. Howard--instructed to deliver that to him personally?

A. I didn't deliver that to anybody, no.

Q. No, but you were to deliver it to him personally, weren't you, Mr. Howard of Ladd & Tilton Bank?

A. I don't know. I don't remember who I was to deliver it to.

Q. Did you take the check yourself over to the bank?

A. Yes, I was to deliver it to Mr. Howard.

Q. And when you went into the bank, was Mr. Howard there?

A. No.

Q. And did you leave the check?

A. No, I didn't leave the check.

Q. Took it away with you?

A. Yes, sir.

Q. Do you know about what time that was, Mr. Katz?

A. What time of day?

Q. No, about what day of the month or in what month?

A. I couldn't say.

Q. Was it in April or May?

A. It might have been; might not have been; I couldn't say.

Q. Might have been what?

A. Might have been April, or May, or June. I don't recall right now.

Q. But it was after April 3rd, wasn't it?

A. Yes, it was after April 3rd.

Q. And it was done with the knowledge that Sullivan had still these outstanding claims, wasn't it?

A. Hicks told me to take it up there; that is all I know.

Q. Hicks did himself?

A. I believe it was Hicks. I couldn't say positively. I got orders from somebody.

Q. Now, Mr. Katz, it was always your understanding—see if this isn't true—it was always your understanding that all the money which Sullivan earned under his contract was to be paid to Ladd & Tilton Bank?

A. Was to be through them, yes.

Q. Yes, to be paid through Ladd & Tilton. Was to be paid in checks drawn to the order of Ladd & Tilton Bank?

A. Yes, sir.

Q. And that money was to be paid to Ladd & Tilton Bank irrespective of the claims of any one else. Is that your understanding?

A. No.

Q. What was your understanding about that, Mr. Katz?

A. The \$700.00—Sullivan—that—when I made that check out, I gave it to them with the distinct understanding it was to be paid to his creditors.

Q. Drawn to his orders?

A. Ladd & Tiltons.



Q. Your understanding was that Sullivan was to get some of that money that was to be paid to Ladd & Tilton Bank?

A. Yes, but—

Q. I am not trying to get anything wrong; I am trying to get the facts of the matter. I think a great mistake has been made, and I want to see if it is true. Your understanding of this whole business was that by virtue of this assignment given to Ladd & Tilton Bank by Sullivan and accepted by Hicks, through your Mr. Wagner, that all the moneys earned by Mr. Sullivan under that contract, was to be paid through Ladd & Tilton Bank?

A. Yes, sir.

Q. That was your understanding?

A. Yes, sir.

Q. And it was also your understanding that that was to be paid through Ladd & Tilton Bank, irrespective of the fact that any labor or material men had a claim on Sullivan's money, because of labor or material furnished?

A. No.

Q. What was your understanding of that?

A. It was to be paid to them provided the Sullivan Company got it. For when I gave Sullivan this check—I gave him check for \$700.00—I told him to bring in receipts; I made out receipts for the bills he was to pay it for, and in the morning—he said he would have them here by ten o'clock; I said "All right, if you don't, I will stop payment on the check"

and he didn't have them in there by ten o'clock and I went and stopped payment on the check.

Q. What check are you speaking of now?

A. Check I gave him for seven hundred odd dollars—seven hundred one, something like that.

Q. That was made payable to Ladd & Tilton Bank?

A. Yes.

Q. You don't quite understand my meaning. What I wanted to understand was this: Your interpretation of the relation which existed between Sullivan and Hicks and the Bank. I want to understand just what you thought that relationship was. Did you feel that at all times the money which Sullivan earned must be paid to the bank, irrespective of any labor or material men's claims?

A. No.

Q. Let's take this example and see if you understand what I mean.

Mr. THOMAS: I think that is subject to objection.

COURT: Let him go ahead with it.

Mr. HUNT: I think a mistake has been made, and if so it is as much to his credit as ours.

COURT: His interpretation of the contract wouldn't be binding.

Q. Let us just take for illustration: Your Hicks Company—you are Mr. Hicks; you have a thousand dollars in your hand that has been assigned to Ladd & Tilton Bank by Mr. Sullivan as was done in this

case. Now, the Acme Plaster Company has a claim for a thousand dollars for material furnished to the Lincoln High School, which was the thing Mr. Hicks and yourself were building. You had a thousand dollars in your hand and you wanted to pay it to somebody. "I owe it; somebody has earned it for the work has been done. Here is Sullivan, he has assigned it to Ladd & Tilton Bank, so he is not entitled to it. Here is Ladd & Tilton Bank who hold the assignment, and here is the Acme Plaster Company who furnished material." Now, who would you have paid that thousand dollars to if such a contingency had arisen?

A. If the thing was O. K. would have paid to Ladd & Tilton Bank.

Q. Would have paid to Ladd & Tilton Bank?

A. Yes.

Q. That is what I thought. That is what I understood your interpretation of the contract would have been. Now, Mr. Katz, just one more question: You understood, did you not at all times, particularly when you wrote this letter of April 3rd, 1912,—you understood that the money which Sullivan had earned, and which would be paid under his contract, would be paid to Ladd & Tilton Bank?

A. Yes.

Q. And you thought that the balance mentioned in that letter of \$4300.00 would be paid to Ladd & Tilton Bank, on or about May 1st. Wasn't that what you thought?

A. At the time of that writing, yes.

Q. And you wanted them to so understand that, didn't you? That Sullivan had earned \$4300.00, and that if they would release \$700.00 now, that the balance would be paid on or about May 1st. Wasn't that it?

A. Paid through them on or about May 1st.

Q. That was the impression you intended to create wasn't it?

A. I didn't give that letter to the bank.

Q. No, no, that is true. You didn't give the letter to the bank. But you knew it was going.

A. I didn't want to incriminate; I didn't want to hold the Hicks Company liable.

Q. Of course not, Mr. Katz, and I don't intend your testimony shall show that. I don't intend that at all. But what I want to get at is your intention as expressed in this letter. You wanted the bank to understand by that letter of April 3rd, that Sullivan had earned \$4300.00 which was unpaid.

A. No, he hadn't earned \$4300.00. At least I didn't feel he made \$4300.00 on the job.

Q. You understood that he had unpaid in your hands yet, \$4300?

A. \$4300.00.

Q. And that Sullivan had \$700 worth of outstanding creditors and you wanted these paid because it was an advantage to the Hicks Company, wasn't it?

A. Yes.

Q. You wanted those paid?

A. No advantage to Hicks; it was a courtesy to Mr. Sullivan.

Q. Well, anyway it was, you wanted it paid; however it might have been. You wanted the bank to understand they were to pay this \$700.00, and you would pay the bank \$4300—\$3600.00, which would be seven hundred from forty-three hundred; you would pay the balance of \$3600; the balance of the money would go to the bank. Isn't that right?

A. No.

Q. What did you want them to understand then?

A. Sullivan asked for a letter to them; he wanted to get the money released. I told them—I explained to Mr. Howard the condition of the thing beforehand, and that there would be \$3600 to be paid through Ladd & Tilton Bank. Where it went to, I don't know; if it was the creditors—if they were satisfied by that time, if Sullivan got any money or anything he could pay these men off, why it would have to be paid through Ladd & Tilton.

Q. Did you understand at that time, Mr. Katz, that Hicks was going to have to pay any of these claimants under Sullivan? You knew Hicks would have to pay his own bills, but did you know that Hicks was going to have to pay any bills of Sullivan's?

A. Sure.

Q. You did. At that time you thought that?

A. Yes.

Q. Why?



A. Well, the contractors is liable for the sub-contractors. We always in all our jobs are held liable.

Q. You are always held liable?

A. Yes, sir.

Q. Well, did you know that Hicks had up a bond?

A. Did I know that he had a bond?

Q. Yes.

A. Yes, sir.

Q. Did you know the amount of that bond?

A. No.

Q. You just simply knew he had a bond up?

A. Knew quite a large bond.

Q. Just a bond to insure the faithful performance of his contract, was it?

A. I don't believe I have ever seen the bond. I couldn't say.

Q. Didn't know what it was for?

A. For fulfillment of the contract was my presumption. That is all.

Q. Now, you knew what the contract called for of course. The new Lincoln High School, wasn't it?

A. Yes.

Q. And did you know at that time, Mr. Katz, that there could not be mechanics' liens against a public building?

A. I did not know that. I had only been in this town a couple of months.

Q. So you didn't know there couldn't be mechanics' liens against a public building at that time?

A. I did not.

Q. So you only figured then if Mr. Hicks was liable on his contract, he would be liable because of mechanics' liens placed against the building. Is that the ground of his liability in your mind?

A. Well, mechanics' liens, or suit, or anything else, attachments; whatever may come in that category.

Q. Well, I think I understand the point that I have been striving so hard for. Nothing to Mr. Katz disgrace or dishonor about that matter. Simply this, Mr. Katz, I wanted to understand your interpretation of the contract. You felt that as between two contesting claims, Ladd & Tilton Bank on one side with an assignment, and the Acme Plaster Company on the other side for material, you would have to pay the bank. That was your feeling, wasn't it?

A. I would have paid Ladd & Tilton Bank in preference—I don't know; I wouldn't have paid either of them, if a case like it was here.

### Redirect Examination.

#### Questions by Mr. THOMAS:

You don't pretend you knew what the law was in reference to a matter of that kind, at that time, do you?

A. I have since found out they couldn't lien a school building in this town.

Q. You didn't know at that time what the law was in reference to a matter of that kind as to whether the Hicks Company would have to pay these claim-

ants, did you?

A. I was under the impression they would have to pay them.

Q. You don't mean to say then, that you considered this contract to mean that you would have to pay Ladd & Tilton and then in addition to that pay the claims against the building?

A. Certainly not.

COURT: Did you know at that time that Sullivan's firm individually owed Ladd & Tilton?

A. Yes, I knew.

COURT: You knew Sullivan was indebted personally to Ladd & Tilton?

A. No, not personally.

COURT: The corporation?

A. Yes, Mr. Howard told me.

Q. But it wasn't your intention in writing that letter that you meant to pay Ladd & Tilton and also pay in addition claims which would amount to more than \$4300.00 due the Sullivan Company?

A. No.

Q. Why did you fix May 1st as the time in that letter?

A. Well, this must have been in the latter part of March he completed his contract; they usually hold about 35 days.

Q. This is dated April 1st.

A. April 3rd.

Q. Down in here you say: "Of this amount we are willing to pay you now \$700." "There will be

due you on or about May 1st"—a balance due you. How did you happen to fix that May 1st?

A. Thirty five days is the expiration of the lien.

Q. You thought there was a lien period?

A. Yes.

#### Recross Examination.

Questions by Mr. HUNT:

If I may go back just one step. When you delivered the check to Ladd & Tilton Bank, under the order of Mr. Hicks for the amount of money.

A. Well, I won't say Mr. Hicks gave me the order. Some one over me did.

Q. Some one in the office did, whoever it was. When you delivered that check there, did the person so ordering you and the attorney for the company understand all the facts in this case?

A. I don't know what their understanding was.

Q. You don't know whether they knew there were unpaid creditors?

A. I don't know.

#### Redirect Examination.

Questions by Mr. THOMAS:

You took that check back when you didn't find Mr. Howard there. Why didn't you return with it to Mr. Howard afterwards?

A. I think I did return the next day, and found him out again. In the morning.

Q. Why didn't you finally turn the check over to

him?

A. Well, there was some—I got orders from somebody not to do it.

Mr. HUNT: Do you know from whom?

A. No, I couldn't state definitely, but it was either Mr. Wagner or Mr. Hicks. Must have been either one of them for they are the only ones over me.

Mr. HUNT: Is Mr. Wagner here now?

A. No, he is not.

Witness excused.

Mr. THOMAS: I desire to go on the stand myself in connection with this check proposition. That is all the evidence I have.

WARREN E. THOMAS, a witness called on behalf of the defendant, being first duly sworn testified as follows, without interrogatories.

Mr. Hicks came to me a short time before, probably in the early part of June, at least it was two or three days before Mr. Katz attempted to deliver the check to Mr. Howard—to attempt to determine whether or not Ladd & Tilton Bank should be paid under this order, and we were advised at that time that there were claims against the Sullivan Company that couldn't be paid if this \$3600.00 claim of Ladd & Tilton was to be paid. I knew nothing about this bond having been put up, and I must also confess that I knew nothing about this statute. I knew that there could be no liens placed against a public building. I was familiar with the general Mechanics' Lien Law, and after looking into it, I came to the conclusion that



since these claimants of the Sullivan Company couldn't recover against the building or against the Hicks Company, as I then believed it, that Ladd & Tilton were entitled to be paid, and I advised the payment—very bad advice it was—but I advised the payment to Ladd & Tilton. I pretty near made a very bad mistake, but I knew nothing about this bond having been put up. I discovered afterwards, however, this statute, and very hastily and urgently notified them if the amount had not been paid not to pay it. I then discovered they had attempted to pay it and fortunately Mr. Howard was out; the check hadn't been turned over, and it was at my instance the check hadn't been paid. That is the explanation, and that is all I care to say about it.

Witness excused.

Mr. THOMAS: That is all. We rest.

Defense rests.

Mr. HUNT: I may have a few questions in rebuttal.

Whereupon proceedings herein adjourned until 10 a. m. Tuesday, February 25, 1913.

Portland, Ore., Tuesday, February 25, 1913, 10 a. m.

A. C. SULLIVAN, recalled by defense.

Direct Examination.

Questions by Mr. THOMAS:

Mr. Sullivan, in alluding to the 10,000 feet of blocks to which you testified yesterday, which were delivered at the Smith Building, I desire to know what the

value of this 10,000 feet of blocks was.

A. Well, that was—that 10,000 feet was figured approximately and they would be worth about eight cents a foot or about \$800.

Q. \$800.00. Now, what percent of that would be materials that went into these blocks, and what percent would be the cost of the labor in connection with it?

A. Well, it would be the labor—

Mr. HUNT: I would like to interpose an objection. The rule announced by the Supreme Court of this state is that where articles go into separate buildings, part of which are labor bills and part of which are not, oral evidence is not permissible, so as to determine lienable from non-lienable articles.

COURT: He is asking as to the value of the labor.

Mr. HUNT: I understood the value of the material and I interpose the objection to that.

COURT: Relative to the value of the labor and material in this 10,000 feet.

Mr. HUNT: Save an exception.

A. The labor cost will be about 25 per cent and the material cost probably about—

Q. 75 per cent?

A. No, it would be the material and labor plus the profit. The material would probably be 35 per cent or 40 per cent. The balance would represent the profit.

## Cross Examination.

Questions by Mr. HUNT:

When you were manufacturing blocks in the City of Portland at the time mentioned in the complaint, and referred to in the evidence, did you have any other contracts for the furnishing of blocks for other buildings?

A. While we were working on the school?

Q. Yes.

A. Yes, we had one with the Smith Hotel Building.

Q. Any other?

A. Well, we were furnishing some small orders. Just—not under contracts but under orders given to us.

Q. Will you please state whether at the time you were manufacturing blocks for the Lincoln High School, you were manufacturing blocks from the same material for other jobs.

A. Well, sir, when we got this Smith Hotel Building, we figured on using what three inch blocks were being made at the plant at the High School, to be put into the Smith Hotel. It was an outlet that was provided for these three inch blocks, which had to be made in making the six inch blocks.

Q. Was it your intention at the time you were manufacturing blocks for the Lincoln High School to manufacture other blocks to keep in stock as future reserve?

Mr. THOMAS: We object to intention; the question is whether he did.

Q. I will frame the question differently. Did you manufacture other blocks to keep in reserve as a stock?

A. Well, at the time they were made, they were not intended particularly for stock; we intended to sell them if we could. It happens that we still have some of them in stock.

Q. Did you manufacture more blocks at this time than you knew would be necessary to put in the Lincoln High School?

A. Well, we made more of those three inch blocks than we knew would be used. We didn't make any more other sizes than supposed to go in the school.

Mr. HUNT: That is all in cross examination, if I can have Mr. Sullivan for the purpose of rebuttal while he is on the stand.

Q. Mr. Sullivan, I wish you would make it clear whether or not you ever told Mr. Howard, prior to the first day of April, that you had indebtedness accruing on account of unpaid labor and material claims on the Lincoln High School and your contract with Hicks.

A. No, sir, I don't think I ever spoke to Mr. Howard about it at that time—previous to that time.

Mr. THOMAS: What date was that—April 1st?

Mr. HUNT: April 3rd, the date of the notice.

A. That is I don't think I ever directly called his attention to it or explained to him what we owed.

Q. Was it your intention Mr. Howard should so

understand you had other indebtedness, or did you intend he should be kept ignorant of that fact?

A. I didn't particularly mean he should be kept ignorant of it, but I wasn't anxious that he should know at that time just how we were involved. Just as I didn't—I didn't go to him and let him know that we were or to what extent, but I didn't use any means of not letting him know.

Q. Beg pardon?

A. I didn't use any means of not letting him know.

Q. You mean you didn't wilfully conceal, but you just simply didn't tell him the facts which he didn't ask about?

A. Yes, sir.

Q. Mr. Sullivan, I wish you would state if you know whether or not Ladd & Tilton Bank would have been in a better position at any time prior to the 3rd day of April, 1912, to have obtained satisfaction or security from the Sullivan Fireproof Partition Company, in reference to this debt, than it would have been any time subsequent to the 1st of May?

Mr. THOMAS: I object to that because counsel has stated that their only chance in this case is one of estoppel and the estoppel can't be prior to the 3rd day of April, 1912, the date of the letter introduced here. They claim their whole estoppel on account of that letter and they can't go back of that for the purpose of proving any estoppel.

Mr. HUNT: I think that is probably right. I will frame the question this way:



Q. Would the Ladd & Tilton Bank have been in a better position at any time subsequent to the 3rd day of April, and prior to the 1st day of May, to have obtained satisfaction or security from the indebtedness owing, than it would have been any time subsequent to the first day of May?

A. Well, they might have been but I can't say. I can't say what conditions might be brought about by their endeavoring to collect at any time. It might have been better or it might have been worse.

Q. But I understand you to say that if they had sued subsequent to the 3rd day of April and prior to the 1st day of May, they might have been in better position than they were after the first day of May.

Mr. THOMAS: I didn't understand him to say that.

Q. That was my understanding; if that is not true, what was?

A. It is possible they might have been or might not have been. I can't presume of course.

Mr. HUNT: That is all.

Witness excused.

J. H. BUSH, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

Mr. HUNT: This witness' testimony is a part of my main case.

Questions by Mr. HUNT:

Mr. Bush, you will please state what official posi-

tion if any you hold with the County of Multnomah, State of Oregon.

A. Chief Deputy County Clerk.

Q. For Multnomah County?

A. For Multnomah County, State of Oregon.

Q. Is it among your duties to have charge of the papers filed in proceedings in the county of Multnomah?

A. It is.

Q. I hand you what purports to be complaint filed in the case of the Lewis A. Hicks Company vs. Sullivan Fireproof Partition Company, a corporation, and the United States Fidelity & Guaranty Company, a corporation, and ask you if that is such complaint.

A. It is a duly certified copy of the complaint as filed, in the Circuit Court of the State of Oregon, for the County of Multnomah.

Q. And is that suit now pending?

A. Now pending.

Q. Is that a certified copy of all the pleadings in that case?

A. Certified copy of that complaint. That is the only thing on file, I think, except the summons.

Mr. HUNT: If your Honor please, I should like to offer this in evidence. I am not sure as to its materiality except as to this point—my purpose is this: That the Hicks Company has pled that they are liable for these unpaid material men and labor claims, and I have denied that fact, and this complaint shows that they are now suing the Sullivan Fireproof Par-

tition Company and the Surety Company for the amounts which they are defending against us. The amounts are identical.

COURT: Put it in the record, subject to Mr. Thomas' objection.

Mr. THOMAS: I think it is immaterial and by looking at the bond in there, it shows that the bond must be sued upon within a certain time, and that the complaint must be filed to protect our rights. We, of course, expect to recover from the bond any difference between \$4500 and \$3700.00.

Complaint marked Plaintiff's Exhibit 9.

Witness excused.

A. C. SULLIVAN, recalled by the defendant.

Direct Examination.

Questions by Mr. THOMAS:

Mr. Sullivan, just before leaving the stand, as I recollect it, you made a statement that there were a few of these blocks that were taken from the High School Building that you still had on hand?

A. Yes, sir, that is right.

Q. I would like to know the amount of those blocks.

A. About—I could only estimate approximately. I think at the present time we have about 12,000 feet of blocks in stock.

Q. You still have those blocks?

A. Yes, sir, or did have the last I knew of them.

Q. Mr. Sullivan, were the entire 12,000 feet taken

from the Lincoln High School Building?

A. Oh no. No, only a portion of them; I should say probably 20 per cent of them were made at the school and taken over to the East Side and put in stock.

Q. 2400 feet?

A. Yes, probably around that amount.

Witness excused.

Defense rests.

R. S. HOWARD, recalled in rebuttal.

Direct Examination.

Questions by Mr. HUNT:

Mr. Howard, will you please state whether or not Mr. Katz of the Hicks Company ever made any statement to you prior to May 1st that the Sullivan Company had unpaid creditors, materialmen and laborers, who would have to be paid out of the funds belonging to Sullivan.

A. He did not.

Q. Did Mr. Sullivan ever so state to you at that time?

A. I have no recollection of it.

Q. Did any one so state to you?

A. I have no recollection.

Witness excused.

Plaintiff rests.

Defense rests.

**[Plaintiff's Exhibit 7.]****ARTICLES OF AGREEMENT.**

This Agreement made this 29th day of April, 1911, at San Francisco, California, between J. D. Sullivan of Salt Lake City, Utah, the first party, and LEWIS A. HICKS COMPANY, a corporation, as original contractor with School District No. 1, Multnomah County, Oregon, the second party.

WITNESSETH: Hereinafter the first party is called the SUB-CONTRACTOR, and the second party is called the CONTRACTOR, and the singular number includes the plural.

All written notices to the SUB-CONTRACTOR provided for by this agreement may be given by mailing a copy of such notice addressed to the SUB-CONTRACTOR at Number 121 Atlas Block, Salt Lake City, Utah, or by delivering a copy of such notice to the SUB-CONTRACTOR in person, or by leaving a copy of such notice at his place of business during business hours.

I. The SUB-CONTRACTOR agrees to furnish the necessary labor and materials, including tools, implements, scaffolding and all appliances required, and perform and complete in a workmanlike manner all work required by the specifications hereinafter mentioned under the headings:

Plaster Block partitions inclusive of the furnishing and setting of all approved partition blocks with grounds, nailing blocks and back boards required for



the fastening of trim or other material attaching to the partitions, but exclusive of bucks for all openings to be supplied and set by the contractor at his own expense, on and in connection with a Brick and Steel High School building now being, or about to be, erected at Portland, Oregon, on that parcel of land described as follows: Block 202, bounded by Mill, Market, Seventh and Park Streets, and at the time and at the rate of progress hereinbelow provided for, in conformity with the plans, drawings and specifications for the same made by Whitehouse and Fouilhoux (and with the contract between the contractor and owner, to which the attention of the sub-contractor is directed), the authorized Architect employed by the OWNER for the construction of said buildings, which plans, drawings and specifications are referred to in the contract for the erection of said building between the CONTRACTOR and said OWNER; and all pages of which plans covering plaster block work and 3 pages of which specifications numbered 50, 51 and 52 have been signed by the parties hereto.

II. The SUB-CONTRACTOR shall commence work on said building under this agreement on the 1st day of July, 1911, unless otherwise notified by the CONTRACTOR in writing, and shall complete said work on the 30th day of September, 1911, progressively as required and directed, to conform to the progress of other crafts. In case the contractor, by reason of unforeseen delays is unable to give the sub-

contractor access to the building on the 1st day of August, the time of completion shall be extended to cover the actual delay, it being understood that the thirty days preceding the 1st of August are required for the fabrication and proper curing of the plaster blocks. Anything herein contained to the contrary notwithstanding, the SUB-CONTRACTOR shall commence work on said building under this agreement at any time after Aug. 1, 1911, upon 3 days written notice to the SUB-CONTRACTOR and shall prosecute the work herein provided for with diligence, at all times supplying as much labor and materials as in the judgment of the CONTRACTOR can be used to advantage, regardless of the time of completion above specified.

III. The SUB-CONTRACTOR shall prepare and assemble at temporary shop in the vicinity of the building fit and ready for delivery on said job and open to inspection of the CONTRACTOR the materials to be used in the work herein contracted for as follows:

All the plaster blocks required for the work herein contracted for, viz: 29700 sq. ft. 4-in. Duct partition, 25000 sq. ft. 4-in. Straight partition, 73700 sq. ft. 6-in. Straight partition being straight measurement inclusive of payment for all wall openings, fabricated progressively not less than 30 days before required to allow approved curing of same. The above quantities are guaranteed by the Contractor to be sufficient to complete the work called for and in case more is re-

quired, the sub-contractor shall be paid at the rate of 13 cents and 14 cents per sq. ft. respectively for 4-in. and 6-in. blocks set in place. Any change in plans is to be compensated for or deduct for at same rates. If the work requires less material than the quantities named not caused by change of plan, no claim for deduction for such saving shall be made by the contractor. When once thus prepared and assembled said materials must be so kept ready for delivery.

IV. At all times between the date for commencement of work hereunder, and the date of the completion of the work, it shall be the duty of the SUB-CONTRACTOR to have on the job a foreman or superintendent, who shall be the duly authorized representative and agent of the SUB-CONTRACTOR in all matters pertaining to this contract, and a failure of the SUB-CONTRACTOR so to do shall be deemed a failure to supply sufficient workmen to comply with the provisions of this contract, and the SUB-CONTRACTOR stipulates that his superintendent (or if there be none, then his foreman) on the job is such agent.

V. Should the SUB-CONTRACTOR at any time after the time for commencement of the work or for the preparation and assembly of materials, refuse or neglect, without the fault of the Architect, or the CONTRACTOR, to supply sufficient materials and workmen, or either, to comply with the provisions of this contract, for a period of more than two days after

having been notified in writing by the CONTRACTOR to furnish the same, the CONTRACTOR shall have the power to furnish and provide materials and workmen to continue, or commence and continue said work, and the reasonable expense thereof shall be deducted from the amount of the contract price herein specified; and if such reasonable expense, plus the amounts then already paid or payable under and by virtue of this contract, be in the aggregate in excess of the contract price, then the amount of such excess shall be a charge against the SUB-CONTRACTOR, which he agrees to repay to the CONTRACTOR on demand.

IT IS FURTHER AGREED that a failure by the SUB-CONTRACTOR to furnish a sufficiency of materials or workmen, or either, to comply with the provisions of this contract, for more than two days after notice in writing to furnish the same, shall, at the option of the CONTRACTOR, be conclusively deemed to be an abandonment of this contract by the SUB-CONTRACTOR, notice of the exercise of which option is hereby expressly waived by the SUB-CONTRACTOR, and the CONTRACTOR may at his election and without notice furnish and provide materials and workmen for the purpose of finishing and completing, and finish and complete the work required by this contract, and the reasonable expense thereof shall be deducted from the amount of the contract price; and if such reasonable expense, plus the amount then already paid or payable under this con-



tract, be in the aggregate in excess of the contract price, then the amount of such excess shall be a charge against the SUB-CONTRACTOR, which he agrees to repay to the CONTRACTOR on demand.

IT IS AGREED that if the CONTRACTOR shall do the work herein contracted for, or any part thereof, under any provisions of this Sub-division (i. e., Sub-division V), it shall have the right to take and use such materials as may have been made ready for this job by the SUB-CONTRACTOR upon paying or crediting the latter with the value thereof, estimated on the whole contract price. Anything herein contained to the contrary notwithstanding, it is understood and agreed that all materials herein mentioned or referred to remain the property of the SUB-CONTRACTOR until incorporated in said building or until paid or credited for by the CONTRACTOR.

VI. The CONTRACTOR shall provide and furnish to the SUB-CONTRACTOR all details and working drawings necessary to properly delineate said plans and specifications; and the work is to be done and materials furnished in accordance therewith, under the direction and supervision and subject to the approval of the CONTRACTOR and Architect.

VII. The SUB-CONTRACTOR admits that he has examined the site and the drawings and specifications and that the said drawings and specifications and site are adequate for their intended purposes, and covenants and agrees to follow the same in detail and to furnish all the materials of the quality



and kind set forth in said specifications and execute all work strictly in accordance with said drawings, using for data and dimensions the numerals marked on each drawing in preference to what the drawing may scale, and to be governed in each case by the detail drawing, in preference to what the general drawing may show, for the same part of the work; to make the work shown and described by said drawings and specifications a perfect and finished job of its kind; and to acquaint himself fully in regard to the construction and finish, as called for by the specifications for said work. To use due care in the various parts of the work, and whenever the drawings or specifications, or both, for any part of the work, are in his opinion, or the opinion of his agent, faulty, or such as will, if followed, result in unsafe and imperfect construction, or will cause the building either during or after its completion to be insecure or deteriorate in any respect so as to result in pecuniary loss to the OWNER or CONTRACTOR, or in any damage or loss whatsoever to person or property, he will instantly stop work and will notify the CONTRACTOR personally in writing of such opinion and in what regard said drawings and specifications are insufficient; and the part of the work so criticized shall not thereafter proceed until the SUB-CONTRACTOR has received a written order from the CONTRACTOR directing what is to be done and when to proceed. To co-operate with the Sub-contractors for the other work on said building, so that

the whole work shall steadily proceed and become a finished and complete one of its kind, and to so carry on said work that none of the co-operating Sub-contractors shall be hindered or delayed at any time; and when his part of the work is finished to remove from the premises all tools and materials belonging to himself and fill up all holes and trenches, level all mounds or heaps of earth that may have been built, dug, raised or made by him in the execution of his work or incident thereto and remove and clear away all surplus or waste materials or refuse of whatever kind remaining on, in or about the building or property, resulting from or connected with his work, and dispose of such refuse material at such places upon or near the property as the CONTRACTOR may designate, or, if so required, remove it entirely, and so far as he is concerned leave the job in a clean, neat, tidy and workmanlike condition, clear of all refuse and litter of every description. To take all necessary precautions and to place proper guards to prevent accidents; and to put out and keep at night suitable and sufficient lights. To be responsible for all violations of Federal or State laws or City Ordinances relating to the construction of buildings and the obstruction of streets and sidewalks and of any other laws or ordinances affecting said work, and to comply with all the laws or ordinances regulating building construction, including all rules and regulations of the various departments of the municipal government, particularly those relating to the Department of Electricity,

Department of Police, Department of Public Health, Department of Public Works, or to any other department having any control, direction or supervision of buildings or of the use or occupation of streets or any part thereof. And the SUB-CONTRACTOR agrees that he will carefully repair and make good any damages to the street or pavement that may be caused by any operation connected with his work; to obtain and be at the expense of all the necessary permits, licenses and authority from the City, County, State or Federal Government which are required for the proper and lawful prosecution of his work. To at all times give the CONTRACTOR or his agents or employees free access to all parts of the work. To deliver to the CONTRACTOR upon his demand correct statements of the amount of labor performed and materials furnished under the contract. The SUB-CONTRACTOR shall carry on the work described herein at his own risk until the same is fully completed and accepted and he shall rebuild, repair, restore and make good all injuries and damages occasioned by the elements or by other causes to all or any portion of his work.

VIII. The SUB-CONTRACTOR agrees to indemnify and hold harmless the CONTRACTOR from any and all claims for damages by reason of injuries to person or property occurring in the course of the performance of the work herein provided for; and in case any accident occurs in the course of the performance of the work herein provided for which re-

sults in loss, injury or damage to any person or the property of any person or to the premises or property on which this agreement is to be performed, or to the premises, land, buildings or walls adjoining said premises on which this agreement is to be performed, then the said SUB-CONTRACTOR will obtain acquittances and complete discharges from such damaged or injured person or from his personal representative, or will make payment in full to such damaged or injured person or personal representative of such an amount as may be agreed upon by way of settlement or compromise between them; and in case of claim made or suit brought against said CONTRACTOR arising out of or on account of any such personal injury, death or damage to property or premises above mentioned said SUB-CONTRACTOR hereby expressly agrees and binds himself, his heirs, executors, administrators, successors and assigns to well and truly defend, indemnify and forever save harmless said CONTRACTOR from the necessity of defending such suit or suits or paying such claim or claims or any part thereof or from any expense or pecuniary loss in connection with the same; to re-pay said CONTRACTOR any sums necessarily expended by him by way of costs, attorney's fees or otherwise in defending against any such claim or claims and to himself cause any such suit or suits to be defended to their end or compromised, paying all sums, charges, costs and attorney's fees whatsoever thereby entailed.

IX. The SUB-CONTRACTOR expressly cove-



nants and agrees to protect and save harmless the CONTRACTOR from loss or damage by suit or otherwise for infringement or alleged infringement of patents for materials or methods used in the doing of any work provided for herein, called for in the drawings or specifications referred to in this contract. The SUB-CONTRACTOR further covenants and agrees that he will repair and replace any part of the work done under this contract which shall be found to be defective or faulty, to the same extent and for the same period of time that the CONTRACTOR is or may be liable to the OWNER to repair or replace the same.

X. The SUB-CONTRACTOR agrees to save and keep the said building and premises free and clear of any and all mechanics' liens for work or labor done or materials furnished in the doing of the work specified herein, and in this connection the SUB-CONTRACTOR agrees to pay promptly as they become due all sums incurred for such work or labor done or materials furnished, and in case of any default on the part of the SUB-CONTRACTOR, the CONTRACTOR shall have the right to pay said sums, together with any additional sums the payment of which is necessitated by such default of the SUB-CONTRACTOR, either for costs, attorney's fees or otherwise, and all sums so paid by the CONTRACTOR shall be repaid by the SUB-CONTRACTOR, and the CONTRACTOR may withhold any money due the SUB-CONTRACTOR until such indebtedness is repaid,



and the CONTRACTOR may declare this contract rescinded, resume possession of the premises, complete the work and charge the same against the SUB-CONTRACTOR, all in the manner and with the same rights as are provided in subdivision V hereof.

XI. Should the SUB-CONTRACTOR fail to complete this contract and the works provided for herein within the time for such completion determined according to the terms of this agreement he shall be liable to the CONTRACTOR for all loss and damages which it may suffer on account of such failure. It is further understood and agreed that no extra allowance of time shall be made for the performance and completion of any extra work, alterations or additions required or ordered as herein provided, but that such extra work, alterations and additions shall be completed as if they had been comprised in the original work and within the period limited for the completion of the same, unless an extension of time is permitted in writing by the CONTRACTOR.

XII. The CONTRACTOR agrees in consideration of the performance of this contract by the SUB-CONTRACTOR to pay or cause to be paid to the SUB-CONTRACTOR, the sum of Seventeen thousand five hundred no 100 Dollars at the times and in the manner following, to-wit: Seventy five per cent of the value of the material installed, every two weeks, on the 1st and 15th of each month respectively, and the remaining twenty five per cent thirty five days after the final completion and acceptance of all the

work in this contract.

The proportion in value of said work and materials furnished to the whole contract price shall be estimated by the CONTRACTOR.

PROVIDED, that when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained by the SUB-CONTRACTOR from the said Architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and the said architect shall at said times deliver said certificates under his hand to the SUB-CONTRACTOR, or, in lieu of such certificates, shall deliver to the SUB-CONTRACTOR in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied to entitle the SUB-CONTRACTOR to the certificate or certificates, and Provided, that at the option of the CONTRACTOR no payment shall become due until the SUB-CONTRACTOR shall have delivered to the CONTRACTOR receipts showing, to the satisfaction of the CONTRACTOR, payment by the SUB-CONTRACTOR for all labor done and materials furnished under this contract, up to and inclusive of the amount of all previous payments made, and in case of the first payment, inclusive of its amount.

XIII. The specifications and drawings are intended to co-operate, so that any work exhibited in the drawings and not mentioned in the specifications,

or vice versa, is to be executed the same as if both mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications when taken together.

XIV. No part of the work shall be altered from that shown on or described by the plans and specifications, nor shall any work in the nature of extra or additional work to be performed without the express written order of the CONTRACTOR, but the CONTRACTOR may order and direct any increase, diminution or alteration in the work to be performed without in any manner vitiating or affecting this contract, and the SUB-CONTRACTOR shall in pursuance of such order and direction perform the work accordingly. Whenever any extra or additional work in the nature of alteration is required to be done the CONTRACTOR shall fix such prices or cost as it may deem just and equitable and the SUB-CONTRACTOR shall abide thereby, provided it commences such work, but if the SUB-CONTRACTOR declines to execute such work at the prices or cost so fixed then the CONTRACTOR shall have the right to do such work itself or enter into a contract with any other person or persons for its execution. And in case of any diminution or alteration in the work to be performed, of a kind decreasing its reasonable cost, the amount thereof shall be deducted from the amount of the contract price aforesaid by a fair and reasonable valuation.

XV. The rule of practice to be observed in the ful-

fillment of the last foregoing paragraph XIV shall be that upon the demand of either party hereto, the character and valuation of any or all charges, omissions or extra work shall be agreed upon and fixed in writing, signed by the parties hereto prior to execution.

XVI. Should and dispute arise between the parties hereto respecting the true construction of the drawings and specifications, the same shall, in the first instance, be decided by the CONTRACTOR, but should the SUB-CONTRACTOR be dissatisfied with the justice of such decision, or should any dispute arise between the parties hereto respecting the valuation of alterations or work omitted, the disputed matter shall be referred to and decided by two competent persons who are experts in the business of building, one to be selected by each of the parties hereto; and in case they cannot agree, these two shall select an umpire, and the decision of any two of them shall be binding on both parties.

XVII. The payment of progress payments by the CONTRACTOR shall not be construed as an absolute acceptance of the work done up to the time of such payments; but the entire work is to be subjected to the inspection and approval of the Architect and CONTRACTOR at the time it shall be claimed by the SUB-CONTRACTOR that the contract and works are completed.

XVIII. Neither this contract nor any interest therein nor any duties to be performed hereunder shall be assigned voluntarily or involuntarily or sub-

let by the SUB-CONTRACTOR without the written consent of the CONTRACTOR.

XIX. No claim for extra work shall be considered unless the price of the same shall be agreed upon in writing between the parties hereto prior to the commencement of the same.

Time is the essence of this agreement.

Executed in duplicate the day and year first hereinabove written.

LEWIS A. HICKS COMPANY,

By Lewis A. Hicks,

President.

J. D. Sullivan.

By A. C. Sullivan

His attorney in fact.

Approved bond of surety Co. in sum of \$6,000 to be furnished before contract is effective, together with certified copy of power of attorney.

Lewis A. Hicks.

**[Plaintiff's Exhibit 8.]**

Hartman & Thompson, Gen. Agts.

Amount \$6,000.00

Annual Premium \$87.50

THE  
UNITED STATES FIDELITY AND GUAR-  
ANTY COMPANY.

Home Office, Baltimore, Md.

— — — —

KNOW ALL MEN BY THESE PRESENTS,  
That Sullivan Fireproof Partition Co., a corporation



organized under the laws of the State of Washington, (hereinafter called the Principal) and the UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation created and existing under the laws of the State of Maryland, and whose principal office is located in Baltimore City, Maryland (hereinafter called the Surety), are held and firmly bound unto LEWIS A. HICKS COMPANY, a corporation, (hereinafter called the obligee), in the full and just sum of Six Thousand and No|100 (\$6,000.00) Dollars, lawful money of the United States, to the payment of which sum, well and truly to be made, the said Principal binds itself, its successors and assigns, and the said Surety binds itself, its successors and assigns, jointly and severally, firmly by these presents, signed, sealed and delivered this 3d day of November, A. D. 1911.

WHEREAS, said Principal has entered into a certain written contract with the Obligee, which contract was originally executed April 29th, 1911, between J. D. Sullivan, of Salt Lake, Utah, and Lewis A. Hicks Company, and assigned to said principal on the 3d day of November, 1911, wherein it is agreed to do and perform all the work for the plaster block partitions, inclusive of the furnishing and setting of all approved partition blocks with grounds, nailing blocks and back boards required for the fastening of lime or other materials attaching to the partitions, but exclusive of bucks for all openings to be supplied and set by the Contractor at his own ex-

pense, on and in connection with a Brick and Steel High School Building, at Portland, Oregon, on Block 202 bounded by Mill, Market, Seventh and Park Streets, IT IS, HOWEVER, expressly understood and agreed that this bond guarantees the completion of the contract in accordance with its terms and conditions, but it is not intended and does not guarantee against damages for personal injury or infringement of patents, as more specifically referred to in Sections VIII and IX of said contract.

NOW, THEREFORE, The condition of the foregoing obligation is such that if the said Principal shall well and truly indemnify and save harmless the said Obligee from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of the said Principal to be performed, then this obligation shall be void; otherwise to remain in full force and effect in law;

PROVIDED, however, that this bond is issued subject to the following conditions and provisions:

FIRST: That no liability shall attach to the Surety hereunder unless, in the event of any default on the part of the Principal in the performance of any of the terms, covenants or conditions of the said contract, the Obligee shall promptly upon knowledge thereof, and in any event not later than thirty days after the occurrence of such default, deliver to the Surety at its office in the City of Portland, Oregon, written notice thereof with a statement of the principal facts showing such default and the date there-

of; nor unless the said Obligee shall deliver written notice to the Surety at its office aforesaid, and the consent of the Surety thereto obtained, before making to the Principal the final payment provided for under the contract herein referred to.

SECOND.—That in case of such default on the part of the Principal the Surety shall have the right, if it so desire, to assume and complete or procure the completion of said contract; and in case of such default, the Surety shall be subrogated and entitled to all the rights and properties of the Principal arising out of the said contract and otherwise, including all securities and indemnities theretofore received by the Obligee, and all deferred payments, retained percentages and credits due to the Principal at the time of such default, or to become due thereafter by the terms and dates of the contract.

THIRD.—That in no event shall the Surety be liable for a greater sum than the penalty of this Bond, or subject to any suit, action or other proceeding thereon that is instituted later than the 3d day of November, A. D. 1912.

FOURTH.—That in no event shall the Surety be liable for any damage resulting from, or for the construction or repair of any work damaged or destroyed by an act of God, or the public enemies, or mobs, or riots, or civil commotion, or by employes leaving the work being done under said contract on account of so-called "strikes" or labor difficulties.

IN TESTIMONY WHEREOF, the said Principal

has caused these presents to be sealed with its corporate seal, attested by the signature of its duly authorized officers, and the said Surety has caused these presents to be executed by its Attorney-in-fact, sealed with its corporate seal, the day and year first above written.

SULLIVAN FIREPROOF PARTITION CO.

By A. C. Sullivan,  
Secretary.

ATTEST: J. D. Sullivan, President.

By A. C. Sullivan,  
His Atty. in fact.

THE UNITED STATES FIDELITY AND  
GUARANTY CO.

Countersigned by                      By Douglas R. Tate,  
HARTMAN & THOMPSON,      Attorney-in-fact.  
General Agents.                      (Seal)

Jan. 18th, 1912.

Received of Lewis A. Hicks Co.

Power of Attorney from J. D. Sullivan to A. C. Sullivan, same having been attached to bond.

A. C. Sullivan.

[Defendant's Exhibit "A".]

WHITEHOUSE & FOUILHOUX  
Architects.

Portland, Oregon

This Agreement, made the .....  
day of January in the year one thousand nine hundred  
and eleven by and between Lewis A. Hicks Company,

a corporation organized under the law of Nevada, party of the first part (hereinafter designated the Contractor), and School District No. 1 of Multnomah County, Oregon, party of the second part (hereinafter designated the Owner),

Witnesseth, that the Contractor, in consideration of the agreements herein made by the Owner, agree with the said Owner as follows:

Article I. The Contractor shall and will provide all the materials and perform all the work for the complete construction, with the exception of the heating and ventilating, plumbing, electric wiring, and fixtures, finishing hardware, plastering, painting, glazing and linoleum flooring, of the whole basement and part of building above first floor shown on plans between Market, Mill, Park Streets and red line, of the New Lincoln High School, as shown on the drawings and described in the specifications prepared by WHITEHOUSE & FOUILHOUX, Architects, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract.

Art. II. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direction of the said Architects, and that their decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be neces-



sary to detail and illustrate the work to be done are to be furnished by said Architects, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in Art. I.

It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said Architects are and remain their property, and that all charges for the use of the same, and for the services of said Architects, are to be paid by the said Owner.

Art. III. No alterations shall be made in the work except upon written order of the Architects; the amount to be paid by the Owner or allowed by the Contractor by virtue of such alterations to be stated in said order. Should the Owner and Contractor not agree as to amount to be paid or allowed, the work shall go on under the order required above, and in case of failure to agree, the determination of said amount shall be referred to arbitration, as provided for in Art. XII of this contract.

Art. IV. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architects or their authorized representatives; shall, within twenty-four hours after receiving written notice from the Architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them, whether worked or unworked, and to take down all portions of the work which the Architects shall by like written notice

condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby.

Art. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architects, the Owner shall be at liberty, after three days written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor they shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall ex-

ceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor; but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architects, whose certificate thereof shall be conclusive upon the parties.

Art. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated, to wit:

Have the entire building ready to be plastered within eight months from execution of this contract, the interior finish to be set as soon as plaster work will permit, and should they fail to complete the work within the time agreed on, agrees to pay to the Owner for each and every day of such delay beyond the term of completion, as above defined, the sum of One Hundred Dollars (\$100.00) which sum is hereby agreed upon, fixed and determined by the parties hereto as the liquidated damages that the Owner will suffer by such default and shall be deducted as such from the balance due the contractors.

Art. VII. Should the Contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the Owner, of the Architects, or of any other contractor employed by the Owner upon

the work, or by any damage caused by fire or other casualty for which the Contractor are not responsible, or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the Architects; but no such allowance shall be made unless a claim therefor is presented in writing to the Architects within forty-eight hours of the occurrence of such delay.

Art. VIII. The Owner agree to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress, and in the event of failure so to do, thereby causing loss to the Contractor, agree that they will reimburse the Contractor for such loss; and the Contractor agree that if they shall delay the progress of the work so as to cause loss for which the Owner shall become liable, then they shall reimburse the Owner for such loss. Should the Owner and Contractor fail to agree as to the amount of loss comprehended in this Article, the determination of the amount shall be referred to arbitration as provided in Art. XII of this contract.

IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be two hundred and sixty-seven thousand, one hundred

and no-100 Dollars (\$267,100.00) subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owner to the contractor, in current funds, and only upon certificates of the Architects, as follows:

Payments will be made monthly on account of the work executed to the satisfaction of the Architects, based on the estimated ninety per cent (90%) value thereof as ascertained by the Architects the balance of ten per cent (10%) of such estimate will be retained until the final inspection of all materials embraced in this contract and the acceptance of the work, and which being the final payment shall be made within thirty-three days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner of the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify.....against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor default.

Art. X. It is further mutually agreed between the parties hereto that no certificate given or payment



made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Art. XI. The Contractor shall during the progress of the work maintain insurance on the same against loss or damage by fire, the policies to cover all work incorporated in the building, and all materials for the same in or about the premises, and to be made payable to the parties hereto, as their interest may appear.

Art. XII. In case the Owner and Contractor fail to agree in relation to matters of payment allowance or loss referred to in Arts. III or VIII of this contract, or should either of them dissent from the decision of the Architects referred to in Art. VII of this contract, which dissent shall have been filed in writing with the Architects within ten days of the announcement of such decision, then the matter shall be referred to a Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party hereto shall pay one half of the expense of such reference.

Art. XIII. It is further agreed by and between the parties hereto that any changes in the plans and specifications made by the Owner, touching the work done under this contract, shall not in any way impair

the validity of same as to its general binding force and effect or have any other effect than as to the changes made and in all other respects the contract shall continue in full force and effect as executed and the party further agrees to give a Surety Bond in the Sum of One Hundred Sixty Thousand and no-100 Dollars (\$160,000.00) for the faithful performance of this contract.

The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF the parties to these presents have hereunto set their hands and seals the day and year first above written.

In presence of

LEWIS A. HICKS CO. (Seal)  
Lewis A. Hicks, President.  
SCHOOL DIST. NO. 1, MULT-  
NOMAH CO., ORE.

(SEAL)

By L. W. Sitton, Chairman.

By R. H. Thomas, School Clerk.

**[Stipulation as to Exhibits.]**

IT IS HEREBY STIPULATED AND AGREED by and between the above named parties by and through their respective attorneys of record, that plaintiff's exhibit "9" may be omitted from the bill of exceptions, owing to the great length thereof, and it

is hereby stipulated that said plaintiff's exhibit "9", for the purpose of this appeal shall be deemed to be as follows:

Plaintiff's exhibit "9" is a certified copy of a complaint in an action instituted by Lewis A. Hicks Company, a corporation, plaintiff, vs. Sullivan Fireproof Partition Co., a corporation, and the United States Fidelity and Guaranty Co. a corporation, defendants, in the Circuit Court of the State of Oregon for the County of Multnomah. That said action was instituted by the plaintiff therein for the purpose of recovering from the principal and bondsman the loss sustained by the Lewis A. Hicks Company on account of the default of the Sullivan Fireproof Partition Co., which bond is referred to in this cause as plaintiff's exhibit "8", and further that the said plaintiff in said complaint, to wit, Lewis A. Hicks Company vs. Sullivan Fireproof Partition Co. and the United States Fidelity and Guaranty Co. asked judgment in said complaint against the Sullivan Fireproof Partition Co. and the United States Fidelity Co. in the sum of \$4,818.65, which sum is composed of the various amounts set forth in this bill of exceptions and as testified to by A. C. Sullivan on pages 53 to 65 inclusive, and pages 64 to 72 inclusive, thereof.

IT IS FURTHER STIPULATED AND AGREED that if the Circuit Court of Appeals shall deem this stipulation to be insufficient and that a full copy of the exhibit should have been attached to the bill of exceptions, then and in that case it is hereby

STIPULATED AND AGREED that the said Circuit Court of Appeals may disregard plaintiff's exhibit "9" and shall deem and consider the same not in the case and immaterial to any issues therein, and that the said Circuit Court of Appeals may, if it will, render its decision in this cause irrespective of said plaintiff's exhibit "9".

WOOD, MONTAGUE & HUNT,  
Attorneys for plaintiff.  
CHAMBERLAIN, THOMAS &  
KRAEMER,  
LESTER W. HUMPHREY,  
Attorneys for defendant.

SO ORDERED.

R. S. BEAN,  
Judge.

UNITED STATES OF AMERICA,  
District of Oregon.—ss.

THIS CERTIFIES that on this 16th day of May, 1913, the plaintiff, by Wood, Montague & Hunt, its attorneys, presented to the court the foregoing 113 pages of typewritten matter as and for its bill of exceptions in the above entitled cause, and the defendant having been duly served with a copy thereof and having made no objection thereto, and the court having examined the same and being fully satisfied in the premises, the foregoing is allowed and settled as the bill of exceptions for the plaintiff, duly stating those exceptions taken by the plaintiff to the ruling of the

court during said trial, together with sufficient of the testimony to explain the same. That the foregoing testimony, evidence and exhibits are all of and the whole of the testimony, evidence and exhibits offered and received in the above entitled court and cause.

R. S. BEAN,  
Judge.

[Endorsed]: Bill of Exceptions. Filed May 29, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913, there was duly filed in said Court, a Petition for Writ of Error, in words and figures as follows, to wit:

**[Petition for Writ of Error.]**

(Title.)

Ladd & Tilton Bank, a corporation, plaintiff in the above entitled cause, feeling itself aggrieved by the judgment of the above entitled court, entered the 10th day of March, 1913, comes now by Wood, Montague & Hunt, its attorneys, and petitions said court for an order allowing the said plaintiff to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and approved, and also that an order be made fixing the amount of security which the plaintiff shall



give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

WOOD, MONTAGUE & HUNT,

Attorneys for plaintiff.

[Endorsed]: Petition for Writ of Error. Filed Aug. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913, there was duly filed in said Court, an Order Allowing Writ of Error, in words and figures as follows, to wit:

**[Order Allowing Writ of Error.]**

(Title.)

On this 21 day of August, 1913, came the plaintiff by its attorneys and filed herein and presented to the court its petition praying for the allowance of a writ of error and presented an assignment of errors intended to be urged by it, praying also that the transcript of record and the proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as are proper in the premises, and in consideration

whereof the court does allow the writ of error, upon the plaintiff giving a bond according to law in the sum of five hundred dollars, which will operate as a supersedeas bond.

R. S. BEAN,

Judge of the above entitled court.

[Endorsed]: Order Allowing Writ of Error. Filed Aug. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

**[Assignments of Error.]**

(Title.)

Comes now the plaintiff and files the within assignments of error upon which it will rely in its prosecution of the writ of error in the above entitled suit.

I.

That the United States District Court for the District of Oregon erred in overruling the objection of counsel for plaintiff in error to the following question propounded to the witness A. C. Sullivan, and the answer given in response thereto, which objection was on the ground that the same was incompetent, irrelevant and immaterial and not pertinent to any issues made by the pleadings in the case.

Question by Mr. Thomas:

Q. What were the things that Roebling & Com-

pany furnished to you in connection?

A. There was reinforcing wire.

## II.

That the United States District Court for the District of Oregon erred in overruling the objection of counsel for plaintiff in error to the propounding of the questions to and the answers given by the witness A. C. Sullivan, relative to the claim of Roebbling Sons Company and what was paid thereunder and of what the claim consisted and the consideration therefor. The objection was upon the ground and for the reason that the same was incompetent, irrelevant and immaterial and not material to any issues made by the pleadings in the case. The objection and ruling of the court went to all the testimony concerning said claim, which testimony is as follows:

Questions by Mr. Thomas:

Q. Do you remember, Mr. Sullivan, how the amount of the unpaid claims of the various materialmen furnishing stuff to you upon this building is—what the amount is?

A. Somewhere about \$4500.

Q. About \$4500.00. Have you, Mr. Sullivan, your books here indicating the amounts that are due to the various claimants?

A. Yes.

Q. I will ask you to produce them. (Witness gets boogs.) What book is that you have, Mr. Sullivan?

A. I call it a ledger.

Q. Call it a ledger. Who made the entries in that

book?

A. I did.

Q. So that the entries therein are from your own personal knowledge?

A. Yes, sir.

Q. And they were not entered by anybody else?

A. No, sir.

Q. Is there anything in there, Mr. Sullivan, in connection with the claim of Roebling's Sons Company against the Sullivan Fireproof Partition Company?

A. Yes, sir.

Q. Will you state what the Roeblings' Sons Company furnished to you, if anything, that caused that charge to be put in that book.

To which question counsel for plaintiff in error objected on the ground that the same was not proper cross examination, which objection was sustained by the court, and thereupon counsel for the defendant in error made the witness A. C. Sullivan his own witness and proceeded as upon direct examination.

Questions by Mr. Thomas:

Q. What were the things that Roebling & Company furnished to you in connection?

A. There was reinforcing wire.

Q. Now what did you say that stuff was that Roebling Sons Company furnished?

A. It was reinforcing wire.

Q. Where was that used?

A. It was used in making these blocks.

Q. Blocks for what?

A. Partition blocks.

Q. Partition blocks. Where were the partition blocks used?

A. In the partition work at the Lincoln High School, and other places as well.

Q. What was the amount of the claim of Roebblings Sons?

A. It totalled \$214.99.

Q. Has that claim been paid?

A. Yes, sir.

Q. Who paid it?

A. Hicks Company.

Questions by Mr. Hunt:

Q. Now you say, you testified that the Roebblings Sons Company's claim is the only one that has been paid?

A. Yes, of those we have mentioned.

Q. Do you know that it was paid?

A. Well, Hicks Company told me that it was.

Q. Then you are simply testifying to what they told you?

A. Yes, Roebbling, never told me.

Q. You don't know of your own knowledge that it was paid, do you?

A. Well, I feel pretty well satisfied that it was.

Q. Simply from what they told you, though?

A. Simply from what I heard from them—not from Roebbling.

Q. Well, I won't object to the manner you know



it, but do you know how it was paid?

A. I think through a judgment entered against us and Roebling garnished the money that Hicks had, for our account.

III.

That the United States District Court for the District of Oregon erred in overruling the motion of counsel for plaintiff in error whereby it was moved that the testimony of A. C. Sullivan relative to the payment of Roeblings Sons Company's claim be stricken out, for the reason that it was paid under writ of garnishment served upon the Hicks Company, and under the rule of law Hicks Company could not return anything due the Sullivan Fireproof Partition Co. by virtue of the assignment admitted to be executed in this case.

The testimony of A. C. Sullivan sought to be stricken out is as follows:

Questions by Mr. Thomas:

Q. What was the amount of the claim of Roeblings Sons?

A. It totalled \$214.99.

Q. Has that claim been paid?

A. Yes, sir.

Q. Who paid it?

A. Hicks Company.

Questions by Mr. Hunt:

Q. Now you say, you testified that the Roeblings Sons Company's claim is the only one that has been paid?

A. Yes, of those we have mentioned.

Q. Do you know that it was paid?

A. Well, Hicks Company told me that it was.

Q. Then you are simply testifying to what they told you?

A. Yes, Roebling never told me.

Q. You don't know of your own knowledge that it was paid, do you?

A. Well, I feel pretty well satisfied that it was.

Q. Simply from what they told you, though?

A. Simply from what I heard from them, not from Roebling.

Q. Well, I won't object to the manner you know it, but do you know how it was paid?

A. I think through a judgment entered against us and Roebling garnisheed the money that Hicks had, for our account.

The assignment referred to in the objection, the execution of which is admitted, is as follows, and is plaintiff's exhibit "2":

"Portland, Ore., Dec. 18, 1911.

"Lewis A. Hicks Company,

"Worcester Bldg., City.

"Gentlemen:

"Please pay to Ladd & Tilton Bank, this city, all monies now due and all that may become due on that certain contract between yourselves and the undersigned for the partition work in the New Lincoln High School in this city. This order is meant to cover only as to payments and does not release

“the undersigned from any obligations assumed in the  
“said contract.

“Yours very truly,

“SULLIVAN FIREPROOF PARTITION CO.

“J. D. Sullivan, Pres.

“A. C. Sullivan, V. Pres.

and Sec’y.

“Accepted,

“LEWIS A. HICKS COMPANY.

“By George Wagner, Mgr.”

IV.

That the United States District Court for the District of Oregon erred in overruling the objection of counsel for plaintiff in error to the questions propounded to and the answers given by the witness A. C. Sullivan relative to the amount and character of the claims of the various unpaid materialmen and laborers. The objection of counsel for plaintiff in error was based upon the ground that none of the amounts testified to had been paid and the amount of indebtedness was not liquidated, that it was capable of ascertainment and being made certain, and that the witness should not be permitted to testify to unliquidated and contingent claims, and that the same was pleaded as an element of damages and was capable of being made definite and certain, and that the same had not been reduced to a definite and certain amount so as to enable the same to be pleaded or testified to as an element of damages, and for the further reason that the same was incompetent, irrel-

evant and immaterial to any issues made and presented by the pleadings in this case and to any facts to be determined therefrom.

Counsel for the plaintiff in error then requested the court that it be considered as making objection to each and all of the testimony relating to any and all of said claims of laborers and materialmen which were unliquidated and uncertain and contingent the said objection to go to all of said testimony relating to any of said claims whatsoever, without making objection thereto, and the court then and there stated that the counsel for plaintiff in error should be considered as interposing an objection to each and all of said testimony as relating to any and all of said claims on account of the alleged unpaid creditors, laborers or materialmen of the Sullivan Fireproof Partition Co. The court stated that counsel would be deemed to have made formal objection to each and all of said testimony and that all objections would be overruled by the court and that the plaintiff should in each instance and to each question and answer have an exception thereto which would be and was duly allowed by the court.

The testimony so objected to is as follows:

Questions by Mr. Thomas:

Q. I will call your attention to the claim of the Acme Cement Plaster Company. Will you look at the book and see if there is anything there in connection with the Acme Cement Plaster Company?

A. Yes, sir, the book shows we are owing them

\$836.55.

Q. What was that for?

A. It was for plaster.

Q. Where was the plaster used?

A. It was used in making blocks.

Q. And those blocks were used in the Lincoln High School?

A. Lincoln High School building.

Q. Has this sum of \$836.55 been paid?

A. No, sir.

Q. That is still due the Acme Cement Plaster Company?

A. Yes, sir.

Q. That was for material furnished and used in the Lincoln High School Building?

A. Yes, sir.

Q. Now, will you refer to the Atlas Mixed Mortar Company?

A. We are owing them \$121.30.

Q. What for?

A. For sand and hauling.

Q. In what connection?

A. The Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention the name of the Portland Quarry Company.

A. We are owing them \$134.00 for hauling away rubbish from the Lincoln High School.

Q. Hauling rubbish away from the Lincoln High



School?

A. Yes, sir.

Q. In connection with your contract there?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the Columbia Contract Company.

A. We are owing them \$114.08.

Q. For what?

A. For sand furnished to the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I will call your attention to the name of the Columbia Hardware Company.

A. We owe them \$30.22, as near as I was able to figure it out on the Lincoln High School. We bought hardware from different firms, and a part was delivered to our place on the east side, but as near as I could segregate it, we owe them \$30.22 on the High School.

Q. Do you happen to know the full amount you owe the Columbia Hardware Company?

A. We owe them in addition to the \$30.22—we owe them \$73.33.

Q. But that is not connected with these?

A. No connection with the school.

Q. Has that \$30.22 been paid?

A. No, sir.

Q. I call your attention to the claim of the East Side Transfer Company.

A. We owe them \$75.65.

Q. What is that for?

A. For hauling.

Q. Hauling of what?

A. Hauling blocks.

Q. To the Lincoln High School Building?

A. To the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of E. Hippeley.

A. That is still owing, \$32.35.

Q. What was that for?

A. That was for the rent of motors and some repair work, some wiring.

Q. In the Lincoln High School building?

A. In the Lincoln High School, yes, sir, incidental to this contract.

Q. Incidental to this contract. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Northwest Door Co.

A. We are owing them \$51.05.

Q. What was that for?

A. For some wood parts for our machinery as used at the Lincoln High School.

Q. What was that? Just explain so we can understand.

A. They were wood cores that are used in the operation of making these blocks. They usually last the lifetime of one job or so.

Q. These blocks were hollow; is that the idea?

A. They were hollow and these wood cores were used for making the hollow part; after these blocks are molded in a machine, they are taken out and the wood cores were knocked out.

Q. Those are necessary things in the construction of these blocks?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Oregon Transfer Company.

A. We are owing them \$72.75.

Q. What was that for?

A. For hauling at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Portland Machinery Company.

A. We are owing them \$47.85. That is for—I think it was a fan and some dry kiln trucks used in the operation of drying the blocks.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of the Portland Railway, Light & Power Company.

A. We owe them \$26.80 for power, and \$26.10 for

lights at the Lincoln High School.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of George B. Rate.

A. We owe them \$13.75 for some plaster hair.

Q. Plaster hair?

A. Yes, sir.

Q. Was that used at the Lincoln High School?

A. Yes, sir, I think it was; as near as I can tell it was.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Union Oil Company.

A. We are owing them \$78.25.

Q. What was that for?

A. That is for coal oil furnished at the Lincoln High School.

Q. How was it used?

A. It was used as a sort of lubricant in knocking out these cores.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the Western Lime & Plaster Company.

A. We owe them \$1285.91.

Q. What was that for?

A. For plaster.

Q. Used at the Lincoln High School building?

A. Yes, sir.

Q. Has that been paid for?

A. No, sir.

Q. I call your attention to the claim of Wright & Branch.

A. Wright & Branch—we owe them a balance of \$1400.00.

Q. A balance of \$1400.00?

A. Yes, sir.

Q. What for?

A. It is a balance due them on a sub-contract that they took from us for erecting partitions.

Q. In the Lincoln High School Building?

A. In the Lincoln High School Building.

Q. Has that been paid?

A. No, sir.

Q. I call your attention to the claim of the United States Steel Products Company.

A. We owe a balance of \$150.00.

Q. What was that for?

A. That is for wiring—wire—reinforcing wire.

Q. That is used in these blocks? A small wire?

A. A small chicken wire.

Q. Used as a reinforcement?

A. Yes, sir.

Q. That was used in these blocks used in the Lincoln High School?

A. Yes, sir.

Q. Has that been paid?

A. No, sir.



Mr. A. C. Sullivan, on being cross examined by counsel for the plaintiff, relative to the foregoing testimony, testified as follows:

Questions by Mr. Hunt:

Q. Will you just turn to that book, the pages you had there, Mr. Sullivan, please.

A. Yes, sir.

Q. The Acme Cement Plaster Company, you testified for certain material. What was it? I couldn't understand.

A. That was plaster.

Q. And what was the Atlas Mixed Mortar Company?

A. That was sand and hauling.

Q. That was sand and hauling?

A. Yes, sir.

Q. Can you segregate the two items?

A. Well, hardly. I should say about half and half.

Q. About half and half?

A. That is a guess, though.

Q. And the Portland Quarry Company.

A. That was hauling the rubbish away from the building, broken blocks and the refuse from the floors.

Q. And the Columbia Contract Company?

A. That was for sand.

Q. Any transportation charges in that?

A. What? Hauling to the building, do you mean?

Q. Did they have any transportation charges in this amount you have here?

A. That included the cost of the sand delivered at the High School.

Q. And the Columbia Hardware Company?

A. Why for various forms of hardware we bought from them. Used tools of various kinds.

Q. Tools?

A. Tools, and—oh parts of machinery and parts of boilers and such as that.

Q. That was a part of your permanent equipment and plant, was it not?

A. Part of it was, yes.

Q. Did any part of that enter into the construction of the building?

A. No, the tools were only used in carrying out the work of construction, and the parts of the boilers were used in the boilers in the drying of material.

Q. Who purchased from the Columbia Hardware Company?

A. From them?

Q. Yes.

A. There was a foreman.

Q. I mean was it the Sullivan Fireproof Partition Company that purchased from them?

A. Yes, sir.

Q. Now, you spoke of E. Hippeley, \$32.35, rent of a motor. What was that motor used for?

A. It was used in driving the mixer; we had a big tub mixer with which we mixed up the material used in making the blocks. This motor was used in driving that mixer.

Q. You rented a motor from him?

A. Yes, sir.

Q. The Northwest Door Company. You spoke of furnishing wood as a part of the machinery. I didn't understand what that was.

A. They made us a number of wood cores that were used in forming the hollow part of these blocks. We would set these cores down in the machine, and fill the machine up with plaster; then when it hardened we drove these cores out and have the hollow part of the block in their place.

Q. That was a part of the manufacture of the block, was it not?

A. Yes, a part of the process of making the block.

Q. Now the Oregon Transfer Company was for hauling?

A. Hauling, yes.

Q. Hauling the blocks?

A. Hauling the blocks to the building.

Q. Hauling the wood blocks or the plaster blocks?

A. No, the plaster blocks.

Q. The Portland Machinery Company I believe you said was for dry kiln trucks.

A. Dry kiln trucks, and I think for a fan, if I remember right.

Q. These trucks, just common trucks to put stuff on to carry around?

A. They call it a dry kiln truck; it is used as a part of a car that goes into the dry kiln to carry blocks.

Q. And the fan, what is that?

A. I am not so certain whether their bill included that fan, or whether or not we paid for it. We had a fan and bought it from them, I can't recall whether or not it was paid for.

Q. Then if this bill of \$47.85 does not include the fan, it is all for trucks?

A. Yes, sir, I think that is all we bought from them.

Q. Where are those trucks now?

A. They are over here in a basement where part of this machinery is.

Q. Part of your plant—part of your equipment, are they?

A. They are now, yes.

Q. They were then?

A. They were used as part of the equipment, yes.

Q. Now, the Portland Light & Power Company has a bill of \$52.90 for power and light. What was that power furnished for?

A. To drive the motor.

Q. To drive the motor?

A. Yes, sir.

Q. What motor—the Hippeley motor?

A. Yes, the one that runs the mixer. And also for driving a fan in the dry kiln.

Q. And the light was what?

A. Lights used around the place where we were working.

Q. But this motor, or this power was to drive a motor used in the manufacture of the blocks, was it

not?

A. Yes, sir.

Q. George B. Rate, he furnished plaster hair, is that it?

A. Yes, sir.

Q. Plaster Hair?

A. Yes, sir.

Q. Wright & Branch had a sub-contract for placing the partitions?

A. For placing the partitions.

Q. And the United States Steel Products Company for reinforcing?

A. For wire.

Q. Reinforcing wire?

A. Yes.

Q. Is there any man on this list, Mr. Sullivan, who furnished any material directly that went into the building, or wasn't the material that was furnished, furnished the Sullivan Fireproof Partition Company to be afterwards manufactured into stuff that went into the building?

A. The only thing that actually went into the construction of this building as far as we were concerned were these blocks.

Q. That is the thing you manufacture?

A. Yes, sir.

Q. That is the thing you agree to furnish in your contract?

A. We agreed to furnish and erect them.

Q. And erect them?



A. Yes, sir.

Q. And the stuff you speak of here was sold to your company individually in the course of your manufacture?

A. This was all sold to us to be used in making these blocks—I think, without going over each item.

Q. And do you know whether or not any material was furnished by these parties that went into blocks, which blocks were placed in any other buildings and other places, other than the Lincoln High School?

A. Yes, we had a surplus number of blocks from the school that were taken away and used on the Smith Hotel Building.

Q. Where is that?

A. I think called it Sixth and Main, if I remember right.

Q. That is in the City of Portland.

A. City of Portland, yes, sir.

Q. About how many was that, do you know?

A. Probably about ten thousand feet.

Q. About ten thousand feet?

A. Yes, sir.

Q. And I want to be perfectly sure that a portion of the material that you have testified to here went into these blocks that went into that Hotel at Sixth and Main.

A. Well, how we come to have these, in making blocks that we used in this school, in our machines we get three of the size used in the school and one smaller size, a three inch block used in ordinary par-

titions, and we had no use at the school for any number of these three inch, such as we would have in making a six inch. We had to provide a place of putting them; it was considered sort of a waste, that is, as far as the school was concerned, so we got this Smith job and hauled a considerable number there, but we were afterwards stopped from doing that by the Hicks Company and the architects, so we finished up delivering to that building from our place on the East Side.

## V.

That the United States District Court for the District of Oregon erred in overruling and denying the motion, made by counsel for plaintiff in error at the close of all the testimony in said case, for a judgment on the pleadings and for a verdict and judgment upon the pleadings and testimony, which motion was based upon the following grounds:

"1. That the defense of estoppel as set forth in "the plaintiff's reply was clearly established and that "the defendant Lewis A. Hicks Company was bound "by the written assignment of the Sullivan Fireproof "Partition Co. to Ladd & Tilton Bank, and the acceptance thereof by the Lewis A. Hicks Company, "dated the 18th day of December, 1911, and the written notification given by the said Lewis A. Hicks "Company, based on the written assignment and acceptance, which said written notification was dated "April 3, 1912, and that the facts and matters set "forth in the pleadings by the defendant did not con-

“stitute a defense to the matter of estoppel pleaded  
“by the plaintiff.

“2. That the claims for materials furnished and  
“labor done by the materialmen and laborers were  
“contingent and uncertain; that the same was pleaded  
“as a matter of defense and as damages; that the same  
“were improper and insufficiently pleaded, and fur-  
“ther were pleaded as uncertain and unliquidated  
“damages and the same did not constitute a proper  
“defense or any defense to the plaintiff’s action and  
“the testimony admitted thereon was not properly  
“received; that the said defense and allegations there-  
“of and the testimony thereto should be disregarded.

“3. That the materials furnished by the material-  
“men and the labor performed by the laborers was  
“not such as would give rise to or sustain a mechanic’s  
“lien in the State of Oregon.

“4. That inasmuch as the building which the  
“Lewis A. Hicks Company had a contract to erect  
“and was erecting was a public school building and  
“could not be liened by materialmen or laborers the  
“bond which the Lewis A. Hicks Company gave to  
“insure the performance of its contract took the place  
“of the building for the purpose of mechanics’ liens,  
“and that if a mechanic’s lien could not have been  
“successfully asserted against a building which would  
“be lienable under the laws of the State of Oregon  
“on account of materials or labor furnished, then such  
“claim could not be successfully placed or filed  
“against said bond, and further that no greater right

“or privilege was given by or could be asserted  
“against the said bond than against a lienable build-  
“ing under the laws of the State of Oregon.

“5. The testimony shows that all of the materials  
“furnished to the Sullivan Fireproof Partition Co.,  
“the sub-contractor, did not enter into the Lincoln  
“High School building, the building which the Lewis  
“A. Hicks Company was under contract to erect, and  
“that under the laws of the State of Oregon relative  
“to mechanics’ liens the various bills for labor and ma-  
“terials were not capable of being asserted against  
“the bond which took the place of the building for  
“lien purposes.

“6. That the testimony shows that the materials  
“furnished by the various materialmen and the labor  
“performed by the various laborers for the Sullivan  
“Fireproof Partition Co. on account of its sub-con-  
“tract with the Lewis A. Hicks Company, was fur-  
“nished and performed upon the credit of the Sullivan  
“Fireproof Partition Co. and not upon the credit of  
“the building or upon the credit of the bond, and fur-  
“thermore that none of the materials furnished the  
“Sullivan Fireproof Partition Co. entered into the  
“said building, but the same were used for the purpose  
“of manufacturing a new commodity, entire separate  
“and distinct from the component parts thereof, and  
“composed of the materials furnished by the various  
“materialmen, and the whole character of the mate-  
“rials being changed and commingled into a new and  
“distinct manufactured article, they lost their orig-

"inal character to such an extent as to be non-liable  
"items under the laws of the State of Oregon against  
"the bond, the bond having taken the place of the  
"building for the purpose of mechanics' liens."

#### VI.

That the United States District Court for the District of Oregon erred in making the following finding:

"Under the bond of Hicks & Company to the School  
"District it and its surety became liable for the pay-  
"ment of labor and material furnished to sub-con-  
"tractors and which were used in the construction of  
"the building, and to an action in the name of the  
"State for the use and benefit of the labor and ma-  
"terial claimants. (Sec. 6266 L. O. L., Hill vs. Amer-  
"ican Surety Co., 200 U. S. 197, Smith vs. Mosier, 169  
"Fed. 430.) The order and assignment from the Sul-  
"livan Company to the plaintiff was subject and sub-  
"ordinate to the terms of the contract between it and  
"the defendant and their respective rights and liabil-  
"ities thereunder. The plaintiff, therefore, knew or  
"was chargeable with knowledge at the time it ac-  
"cepted the order and assignment and made advances  
"thereunder, that Hicks & Company was liable for  
"the payment of claims for labor and material fur-  
"nished the Sullivan Company in the performance of  
"its contract."

#### VII.

That the United States District Court for the District of Oregon erred in making the following finding:



“The contention is made on behalf of the plaintiff  
“(1) that Hicks & Company cannot assert as a de-  
“fense to this action its liability for unpaid labor and  
“material furnished the Sullivan Company until it  
“has paid and discharged them. And (2) that its  
“liability under its bond is for such claims only as  
“could be made the basis of a mechanic’s lien if such  
“lien could be filed against a public building.

“I am unable to concur in the first position and it  
“is unnecessary to consider the other for, without  
“detailing the evidence, it clearly shows that the un-  
“paid material and labor claims for which liens could  
“have been filed amount in the aggregate to more  
“than the sum now claimed by the plaintiff. The  
“statute (Sec. 6266) in pursuance of which Hicks &  
“Company’s bond was given, provides that any person  
“furnishing labor or supplying material for the con-  
“struction of the building specified in the contract  
“and bond may, when payment for the same has not  
“been made, have a right of action and is authorized  
“to bring suit in the name of the state for his use and  
“benefit against the contractor and surety, and to  
“prosecute the same to final judgment and execution.  
“Hicks & Company and its surety were therefore per-  
“sonally liable for unpaid labor and material claims  
“of the Sullivan Company. The fact that such claims  
“are still unpaid would be a good defense to an action  
“by the Sullivan Company to recover on its contract,  
“and the plaintiff stands in the place and stead of the  
“latter, it is a proper defense to this action.”

## VIII.

That the United States District Court for the District of Oregon erred in making the following finding:

"The principal contention of the plaintiff is that  
"the defendant is estopped by its letter of April 3d,  
"1912, from now asserting that there is not due and  
"owing from it to the Sullivan Company the amount  
"stated therein less the \$700.00. Assuming but not  
"deciding that the letter amounted to a declaration  
"by Hicks & Company that the sum of \$4300.00 was  
"then due and payable to the Sullivan Company and  
"that such sum would be paid the plaintiff in any  
"event, and not a mere declaration that there was such  
"a balance unpaid on the contract with the Sullivan  
"Company, and assuming further that the plaintiff so  
"understood it and relied thereon, there is no room  
"for an application of the doctrine of estoppel because  
"the undisputed facts show that the plaintiff was not  
"thereby misled to its injury. It was no doubt lulled  
"into inaction and in reliance thereon took no steps at  
"the time to enforce its claim against the Sullivan  
"Company, but the undisputed evidence is that the  
"Sullivan Company was in no worse position finan-  
"cially in May, when the defendant refused to make  
"the payment than it was when the letter was writ-  
"ten. The theory of an estoppel in pais is that one  
"who by his acts or conduct has misled another to  
"believe a given state of fact to be true and to act  
"thereon, shall not be permitted to assert the con-

“trary to the injury of the person so acting. The  
“important condition of the right to assert such estop-  
“pel is the fact in addition to all others that the party  
“pleading it must show that the attempted repudia-  
“tion will work him injury by causing him to suffer  
“a loss of some substantial character or that he was  
“thereby induced to alter his position for the worse  
“in some material respect. (16 Cyc. 744; Dickerson  
“vs. Colgrove, 100 U. S. 578). Plaintiff was in no  
“way injured by its delay in proceeding against the  
“Sullivan Company, but its remedy against that com-  
“pany was as full and complete in May, when the de-  
“fendant refused payment, as it was when the letter  
“of April 3rd was written. It was not injured on ac-  
“count of the \$700.00 payment because it was made  
“to pay claims which could have been asserted against  
“it by the defendant, and moreover, it could not right-  
“fully have applied such payment to its own account  
“because it was made on the express understanding  
“of all parties that it was to go to the discharge of  
“labor and material claims.”

IX.

That the United States District Court for the Dis-  
trict of Oregon erred in rendering judgment that the  
plaintiff take nothing by its complaint and that the  
same be dismissed, and erred in rendering judgment  
against the plaintiff for costs, and erred in rendering  
judgment in favor of the defendant and against the  
plaintiff.

WHEREFORE, the plaintiff in error prays that

the judgment of the United States District Court for the District of Oregon be reversed.

WOOD, MONTAGUE & HUNT,  
Attorneys for Plaintiff in Error.

[Endorsed]: Assignments of Error. Filed Aug. 21, 1913.

A. M. CANNON,  
Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913, there was duly filed in said Court, a Bond on Writ of Error, in words and figures as follows, to wit:

**[Bond on Writ of Error.]**

(Title.)

KNOW ALL MEN BY THESE PRESENTS, That we, LADD & TILTON BANK, a corporation organized and existing under and by virtue of the laws of the State of Oregon, and S. L. EDDY and C. B. WOODWORTH, are held and firmly bound unto LEWIS A. HICKS COMPANY, in the sum of Five Hundred Dollars to be paid to the said Lewis A. Hicks Company or its assigns, for which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 21st day of August, 1913.

WHEREAS, the above named Ladd & Tilton Bank

has appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above entitled cause by the District Court of the United States for the District of Oregon;

NOW, THEREFORE, the consideration of this obligation is such that if the above named Ladd & Tilton Bank shall prosecute said appeal to effect, and answer all costs entered against it, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

LADD & TILTON BANK.

By W. H. DUNCKLEY,

Cashier.

S. L. EDDY. (SEAL)

C. B. WOODWORTH. (SEAL)

Signed, sealed and delivered in the presence of:

G. C. BLOHM.

TROY MYERS.

(Corporate Seal)

The foregoing bond approved, August 21, 1913.

R. S. BEAN,

Judge.

[Endorsed]: Bond. Filed Aug. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913, there was duly filed in said Court, a Writ of Error, in words and figures as follows, to wit:



## [Writ of Error.]

*In the United States Circuit Court of Appeals  
for the Ninth District.*

LADD & TILTON BANK, a corporation,  
Plaintiff in Error,  
vs.

LEWIS A. HICKS COMPANY, a corporation,  
Defendant in Error.

THE UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES  
OF AMERICA.

To the Judge of the District Court of the United  
States for the District of Oregon: Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable R. S. Bean one of you, between Ladd & Tilton Bank, a corporation, Plaintiff and Plaintiff in Error, and Lewis A. Hicks Company, a corporation, Defendant and Defendant in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the

same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS THE HONORABLE EDWARD  
DOUGLAS WHITE,

Chief Justice of the Supreme Court of the  
United States this 21 day of August, 1913.

A. M. CANNON,

Clerk of the District Court of the United  
States for the District of Oregon.

[Endorsed]: Writ of Error. Filed Aug. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 21 day of August, 1913,  
there was duly filed in said Court, Citation on  
Writ of Error, in words and figures as follows,  
to wit:

**[Citation on Writ of Error.]**

*In the District Court of the United States for the  
District of Oregon.*

LADD & TILTON BANK, a corporation,  
Plaintiff,

vs.

LEWIS A. HICKS COMPANY, a corporation,  
Defendant.

## UNITED STATES OF AMERICA,

District of Oregon.—ss.

To LEWIS A. HICKS COMPANY, a corporation,  
and CHAMBERLAIN, THOMAS & KRAEMER  
and LESTER W. HUMPHRIES, attorneys for  
Lewis A. Hicks Company:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Oregon, wherein Ladd & Tilton Bank, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland in said district this 21st day of August, in the year of our Lord one thousand nine hundred and thirteen.

R. S. BEAN,

Judge.

Service of the within citation and receipt of copy thereof admitted this 21st day of August, 1913.

CHAMBERLAIN, THOMAS &amp; KRAEMER,

Attorneys for defendant.

[Endorsed]: Citation. Filed Aug. 21, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on Thursday, the 4 day of September, 1913, the same being the ..... Judicial day of the Regular July, 1913, Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

**[Order Enlarging Time to File Record.]**

(Title.)

Now at this date, for good cause shown, it is ordered that the plaintiff's time for filing record and docketing this cause on the appeal thereof in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same hereby is enlarged and extended to and including the 21st day of October, 1913.

-----  
Judge.

**[Clerk's Certificate.]**

UNITED STATES OF AMERICA,

District of Oregon,—ss.

I, A. M. Cannon, Clerk of the United States District Court, District of Oregon, do hereby certify that the foregoing pages numbered 1 to 230, inclusive, contain and are a true transcript of the record and proceedings had in said court in the cause therein entitled Ladd & Tilton Bank, plaintiff, vs. Lewis A. Hicks Co., defendant, and contains in itself, and not by reference, all the pleadings, papers, files, orders

and journal entries in said cause in any manner relating to the final judgment entered therein, together with the opinion of the court, the petition for writ of error, order for writ of error, bond on writ of error, assignments of error, writ of error and citation thereon, as the same appear of record in my office and my official custody.

I further certify that the cost incurred by plaintiff in printing said record is \$.....

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, this ..... day of ....., 1913.

.....  
Clerk.



IN THE  
**United States Circuit Court**  
**of Appeals**  
for the Ninth Circuit.

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LADD & TILTON BANK, a Corporation  
*Plaintiff in Error*

vs.

LEWIS A. HICKS COMPANY, a Corporation  
*Defendant in Error*

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**Brief on Behalf of Plaintiff in Error**

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*Upon Writ of Error to the United States District  
Court for the District of Oregon.*

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**STATEMENT**

The pleadings in this cause have been fully set forth in the transcript of record filed herein, beginning at page 1 and ending on page 34 thereof.

In order to expedite the examination of this cause, we will set forth the issues presented upon the pleadings by recapitulation of the facts therein.

On the 25th day of June, 1912, Ladd & Tilton Bank, a corporation, filed a complaint against the Lewis A.

Hicks Company, a corporation, wherein, after alleging jurisdictional facts, it was alleged that the Lewis A. Hicks Company had entered into a contract with School District No. 1 of Multnomah County, Oregon, wherein the Lewis A. Hicks Company agreed to construct and erect a high school building for School District No. 1 aforesaid, the same being popularly known as the Lincoln High School. Thereafter, the defendant Lewis A. Hicks Company entered into a sub-contract with the Sullivan Fireproof Partition Co. wherein the Sullivan Fireproof Partition Co. was to do certain work in connection with the construction and erection of said building, at an agreed contract price of \$17,500. The Sullivan Fireproof Partition Company thereafter sought to borrow money from Ladd & Tilton Bank, and before making the loan Ladd & Tilton Bank required as security an assignment of all funds due from the Hicks Company to the Sullivan Fireproof Partition Co. on account of said contract. The assignment by the Sullivan Company and acceptance by the Hicks Company are in words and figures as follows, to wit:

“Portland, Ore., Dec. 18, 1911.

Lewis A. Hicks Company,  
Worcester Bldg., City.

Gentlemen:

Please pay to Ladd & Tilton Bank, this city, all monies now due and all that may become due on that certain contract between yourselves and the undersigned for the partition work in the new Lincoln High School in this city. This order is meant to cover only as to pay-

ments and does not release the undersigned from any obligation assumed in the said contract.

Yours very truly,  
Sullivan Fireproof Partition Co.,  
J. D. Sullivan, Pres.,  
A. C. Sullivan, V. Pres. and Sec'y.

Accepted,  
Lewis A. Hicks Company,  
By George Wagner, Mgn."

Thereafter, in recognition of such assignment, the Lewis A. Hicks Company paid to Ladd & Tilton Bank all moneys due to the Sullivan Fireproof Partition Company on account of said contract, save and excepting the last moneys due thereunder, to-wit: \$4300.00. After the Sullivan Fireproof Partition Co. had completed its contract with the Lewis A. Hicks Company, and on April 3, 1912, the Lewis A. Hicks Company notified the Sullivan Fireproof Partition Co. and Ladd & Tilton Bank that there was due on account of said contract between the Sullivan Company and the Hicks Company the balance of said contract price—to-wit: \$4300.00—of which sum the Hicks Company was willing to pay \$700.00 on said date and would pay the balance, \$3600.00, on May 1, 1912, the said notification of April 3, 1912, being in words and figures as follows, to-wit:

"April 3, 1912.

Sullivan Fireproof Partition Co., City,

Gentlemen: As your work has been completed on the Lincoln High School there will be due you on or about May 1st the balance of \$4300.00. According to

your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700, to be applied on accounts on the job, to be paid to Ladd & Tilton Bank.

Yours very truly,

Lewis A. Hicks Company,

FK:KT

By Fred A. Katz."

The complaint alleges that said assignment was duly accepted by the Hicks Company, and that Ladd & Tilton Bank, in reliance upon the assignment of December 18, 1911, loaned \$3500.00 to the Sullivan Company, and thereafter, by virtue of the notification of April 3, 1912, given by the Hicks Company, released the balance of said money earned by the Sullivan Company except \$3600.00 (principal and interest) then due Ladd & Tilton Bank; and that thereafter, and on or about May 1, 1912, Ladd & Tilton Bank made demand upon the Hicks Company for the payment of said \$3600.00, which payment was refused; and judgment was prayed for in that amount.

The defendant filed an answer wherein it admits the execution of the assignment dated December 18, 1911, described in the complaint, and admits that the Hicks Company paid Ladd & Tilton Bank all moneys as they became due under said contract, and admits the execution of the notification of April 3, 1912, and admits the payment on said last mentioned date to Ladd & Tilton Bank for the benefit of the Sullivan Company of \$700.00, as set forth in the complaint. And for a further defense it alleges that the Lewis A. Hicks Company en-



tered into a contract with School District No. 1 of Multnomah County, Oregon, for the construction of a school building known as the new Lincoln High School, and that, to comply with the law of the State of Oregon as set forth in section 6266 of Lord's Oregon Laws, the defendant, Lewis A. Hicks Company, executed its bond, as principal, in favor of said School District No. 1, with the Pacific Coast Casualty Company as surety thereon, a copy of which said bond is set forth at length in the answer; the intent and effect of the said bond being, among other things, that said contractor shall well and faithfully perform all the covenants, conditions and provisions of said contract, plans and specifications, and shall pay all claims or liens for labor, work and material on account of all sub-contractors, materialmen, laborers and mechanics furnishing labor or material under contract. The answer further alleges the execution of the contract with the Sullivan Fireproof Partition Co. and that the Sullivan Fireproof Partition Co. agreed to pay, promptly as they became due, all sums incurred for any work or labor done or materials furnished upon said building in connection with said contract. The answer further pleads the execution of the assignment by the Sullivan Company to Ladd & Tilton Bank, and alleges that the same was received by Ladd & Tilton Bank with full knowledge of the obligation of the Sullivan Company in reference to said work; but that thereafter the Sullivan Company was sued by Roebling & Sons Co. for \$214.99 and the Hicks Company garnished, and that thereafter under the writ of garnishment and the return thereon, the Hicks Company paid the amounts



recovered by Roebing Sons Co. in said action. It further alleges in defense that the Sullivan Company had numerous unpaid bills on account of said contract, said unpaid bills totaling \$4496.61, the list of the same being as follows:

Acme Cement Plaster Co.....	\$ 836.55
Atlas Mixed Mortar Co.....	121.30
Portland Quarry Co.....	134.00
Columbia Contract Co.....	114.08
Columbia Hardware Co.....	30.22
East Side Transfer Co.....	75.65
E. Hippeley.....	32.35
Northwest Door Co.....	51.05
Oregon Transfer Co.....	72.75
Portland Machinery Co.....	47.85
Portland Railway, Light & Power Co.....	52.90
George B. Rate.....	13.75
Union Oil Company.....	78.25
Western Lime & Plaster Co.....	1,285.91
Wright & Branch.....	1,400.00
United States Steel Products Co.....	150.00
<hr/>	
Total .....	\$4,496.61

The answer further alleges that the Sullivan Company is insolvent and is unable to pay said bills, and that the Hicks Company will be obligated to pay the same under its bond executed to School District Number 1; and that, owing to the fact of the unpaid bills of the Sullivan Company, there is now nothing due the Sullivan Company and consequently nothing due to Ladd & Tilton Bank.

The plaintiff filed a reply, wherein it admitted the contract between the Hicks Company and School Dis-

trict No. 1, and admitted the execution of the assignment dated December 18th, 1911, and the notification of April 3, 1912, but denied that the bond was executed pursuant to Section 6266, Lord's Oregon Laws, and denied that the Hicks Company or its surety was liable upon the bond to the unpaid creditors, laborers and materialmen of the sub-contractor, Sullivan; and, further replying to said answer, alleged the execution of the assignment dated December 18th, 1911, and the notification dated April 3, 1912, and further alleged that at the time of the notification of April 3, 1912, wherein the Hicks Company notified Sullivan, and Ladd & Tilton Bank, that the contract had been completed and that \$4300 was due thereunder, which would be paid on May 1st, 1912, of which amount the Hicks Company was willing to pay \$700 at that time, was made by the Hicks Company with the knowledge that the sub-contractor Sullivan had numerous unpaid creditors, laborers and materialmen, which knowledge was not known or given to Ladd & Tilton Bank; and that by reason thereof Ladd & Tilton Bank was lulled into a position of false security and released the said \$700 and awaited the further payment of said contract price as mentioned in said notification of April 3d; and that the Hicks Company, by so making such statements with knowledge of the falsity thereof, ought to be and was estopped from asserting as an offset or counterclaim the unpaid accounts of the sub-contractor Sullivan in defense to the action instituted by Ladd & Tilton Bank under the assignment. The estoppel and the facts relative thereto were pleaded at length in the reply of Ladd & Tilton

Bank, and reference to this and all the other pleadings, as contained in the transcript of record, is hereby made for greater particularity.

Complaint .....	Transcript, page	1
Answer .....	“ page	7
Reply .....	“ page	18
Contract between Hicks and School District No. 1.....	“ page	184
Surety bond given by Hicks to School District No. 1.....	“ page	29
Sub-contract between Hicks and Sullivan .....	“ page	165

## POINTS AND AUTHORITIES

### I.

Moneys in the hands of one who has accepted an assignment thereof are not subject to garnishment.

Harrison vs. Louisville & N. R. Co., 23 So. (Ala.) 790.

Emery vs. Lawrence, 8 Cush., 62 Mass. 151.

Wellborn v. Buck, 21 So. (Ala.), 786.

Quigley v. Welter, 104 N. W. (Minn.), 236.

### II.

A surety bond conditioned to save harmless the owner of a building from liens or other claims is not violated by the incurrence of claims and liens for which such owner is not liable.

Smith v. Bowman, 88 Pac. (Utah), 867, 9 L. R. A. (N. S.), 889.

Hunt v. King, 97 Iowa 88, 66 N. W. 71.

Spalding Lumber Company v. Brown, 171 Ill. 487, 49 N. E. 725.

Montgomery v. Reif, 15 Utah 495, 50 Pac. 623.

Simonson v. Grant, 36 Minn. 439, 31 N. W. 861.

Green Bay Lumber Co. v. Independent School District, 121 Iowa 663, 97 N. W. 72.

Editor's Note 9 L. R. A. (N. S.) 889.

School District No. 6 v. Smith, 63 Ore. 586.

### III.

A surety bond covenanting to save harmless the obligee from liens and other charges is a bond for indemnity against damage and is not a bond for indemnity against liability.

Henry v. Hand, 36 Ore. 492, 27 Cyc. 309.

Carson Opera House v. Miller, 16 Nev. 324.

Church v. Conlin, 11 Pa. Superior Court 413, 8 Am. & Eng. Enc. of Law, 2d Ed. 180.

### IV.

A public building in Oregon is not lienable.

Portland Lumbering and Manufacturing Co. v. School District No. 1, 13 Ore. 283.

Benbow v. The James Johns, 56 Ore. 554.

Construction of the Congressional Enactment known as Act. Aug. 13, 1894, Comp. Stat. 1901, p. 2523, as amended Act. Feb. 24, 1905, Comp. Stat. 1901.

United States for the Use of Hill v. American Surety Company, 26 Supreme Ct. Rep. (U. S.) 168.

United States Fidelity & Guaranty Co. v. United States, 24 Sup. Ct. Rep. 142.

Smith v. Mosier, 169 Fed. 430.

United States v. Ansonia Brass & Copper Co., 31 Sup. Ct. Rep. 49.

## V.

General lien laws of the State of Oregon and judicial interpretations thereof.

Sec. 7416 L. O. L. *et seq.*

Fitch v. Howitt, 32 Ore. 396, 52 Pac. 192.

Harrisburg Lbr. Co. v. Washburn, 29 Ore. 164, 44 Pac. 390.

Dalles Lumber Co. v. Woolen Manufacturing Co., 3 Ore. 527.

Kezartee v. Marks, 15 Ore. 529, 16 Pac. 407.

Williams v. Toledo Coal Co., 25 Ore. 426, 36 Pac. 159.

Allen v. Elwert, 29 Ore. 444, 44 Pac. 824.

Hughes v. Lansing, 34 Ore. 124, 55 Pac. 95.

Jones on Liens, sec. 1337.

## VI.

He who by his language or conduct leads another to do what he would not otherwise have done, cannot subject such person to loss or injury by disappointing the expectations upon which he acted. Such action or conduct creates an estoppel in pais.

Federal Case No. 14099, Vol. 24, Fed. Cases.

Kirk v. Hamilton, 102 U. S. Sup. Ct. 68.



Dickerson v. Colgrove, 100 U. S. 578.  
 Misner v. Russell, 29 Mich. 229.  
 Conway National Bank v. Pease, 82 Atl. 1068.  
 Seymour v. Oelrichs, 106 Pac. 88.  
 Swain v. Seamens, 9 Wallace 254 at p. 274.  
 Jones v. Subera, 126 N. W. 253.  
 Jaques v. Esler, 4 N. J. Eq. 461.  
 Carruthers v. Whitney, 105 Pac. 831.  
 Note "d" 134 Am. St. Rep. p. 177.

## VII.

Materials must be furnished with special reference to their use in a particular building in order to secure the protection of the mechanic's lien law.

Jones on Liens 2d Ed. sec. 1326, also sec. 1330,  
 59 Ga. 653.

## ARGUMENT

### ASSIGNMENTS OF ERROR I, II and III.

Inasmuch as assignments of error 1, 2 and 3 (transcript of record, pp. 197-203, inclusive,) are related one to the other, the same will be discussed together under this heading.

The contention of counsel for the plaintiff in error is as follows: The Hicks Company and the Sullivan Company entered into a contract whereby the Sullivan Company as sub-contractor was to do certain work on the Lincoln High School at a fixed consideration. At or shortly after the execution of the contract, on December 18, 1911, the Sullivan Company assigned to Ladd & Tilton Bank all moneys due or to become due under

said contract, which assignment was duly served on the Hicks Company and accepted by it. Thereafter the Sullivan Company undertook to do the work mentioned in its sub-contract, and thereafter and after the date of the assignment to Ladd & Tilton Bank, which was accepted by the Hicks Company, the Sullivan Company was sued by Roebbling's Sons Company in the Justice's Court of Portland, Multnomah County, Oregon, for \$214.99, and after the institution of the action the Hicks Company was served with a writ of garnishment therein and for answer to the writ of garnishment the Hicks Company evidently returned that the sum for which the Roebblings Sons Company was seeking judgment was due the Sullivan Company and in its hands, for the claim of Roebblings Sons Company was subsequently reduced to judgment and the amount was paid by the Hicks Company pursuant to the writ of garnishment. These facts appear in paragraph 12 of the defendant's answer (transcript of record, page 15). At the time of the trial evidence was offered to sustain the allegations of the answer as above referred to, and the evidence developed that the Sullivan Company was sued by the Roebblings Sons Company after the date of the assignment by the Sullivan Company to Ladd & Tilton Bank and the acceptance thereof by the Hicks Company, and that the Hicks Company, notwithstanding such assignment and acceptance, returned, under a writ of garnishment, that it had in its hands moneys due the Sullivan Company sufficient to take care of the amount of such claim. Objection was made to said evidence, which was overruled by the court; and a motion was made to strike

the said testimony from the record, which was also denied by the court. The evidence offered is set forth in the assignments of error, at pages 197 to 202 of the transcript of record.

We contend that the assignment to Ladd & Tilton Bank by the Sullivan Company of all moneys due it arising by virtue of its sub-contract with the Hicks Company, of which assignment the Hicks Company had notice and expressly accepted the same, made wrongful any return of the Hicks Company on the writ of garnishment that anything was due the Sullivan Company, and that anything paid by virtue of said writ was wrongfully paid and could not be made a matter of defense to the claim of this plaintiff.

In support of this contention the following authorities are cited:

Harrison v. Louisville & N. R. Co. 23 Southern (Ala.) 790.

“Where an employer arranges with a merchant (the employee consenting) to withhold from his future earnings each month enough to cover the amount due for provisions furnished him, not to exceed a specified sum for any one month, such amount in the hands of the employer is not the subject of garnishment by third persons.”

In the case of Emery v. Lawrence et al., 8 Cushing, 62 Mass. 151, garnishment was served on a fund which had been previously assigned. The court held that where a workman in the employment of a manufacturing company made an assignment of wages due and which

would thereafter become due to him, to a certain date, in consideration of being indebted to the assignee and an undertaking on the part of the latter to supply his family with groceries from time to time as his family might need them, the assignment, in the absence of fraud, was valid and transferred to the assignee all the assignor's interest in his wages for the time specified, and that such sum was not subject to garnishment.

In the case of *Wellborn v. Buck*, 21 Southern (Ala.) 786, garnishment was served upon a sum which had been assigned, and the court held that the assignment being a good and valid assignment as to all funds which might be earned, even though the employment was contingent upon the happening of an event, the rights of the assignee therein were superior to any rights which the creditors of the assignor could assert.

In the case of *Quigley v. Welter*, 104 N. W. (Minn.) 236, the assignor made an assignment of certain funds to be earned by him, to cover an existing and accruing indebtedness. At the time of the assignment the assignor was indebted to the attaching creditor in the sum of \$123, and this creditor brought suit therefor and garnished the funds in the hands of the employer. The court held that the attaching creditor could take nothing, for all the funds in the hands of the person garnished had already been assigned and the person garnished had notice thereof and could not make a return of funds in his hands belonging to the assignor.

It is to be noted that the rule contended for with reference to the assignment being discussed is clearly deducible from the cases herein cited. The funds in the



hands of the Hicks Company belonging to the Sullivan Company had been assigned by the Sullivan Company to Ladd & Tilton Bank, and the assignment thereof had been accepted by the Hicks Company; and the Hicks Company, upon the service of the writ of garnishment, was obligated to return that there was nothing due the Sullivan Company. If the Hicks Company carelessly interfered in the relation created by this assignment and voluntarily paid money over to a creditor of the Sullivan Company, which the Sullivan Company was not entitled to receive and which did not belong to it, then such action on the part of the Hicks Company was not authorized or justified by the admitted facts in this case and is no defense to plaintiff's claim.

It is submitted that the court committed error in receiving evidence of any money paid out by the Hicks Company under a writ of garnishment and allowing a deduction thereof to be made as against the assignment in the hands of Ladd & Tilton Bank, and that such sum paid out by the Hicks Company was not a proper item of offset or counterclaim.

#### ASSIGNMENT OF ERROR IV AND VI.

For the purpose of brevity and clearness we will combine assignments of error 4 and 5 (transcript of record, pp. 203-220 inclusive) under the argument which follows, these two assignments relating to the same general subject.



We desire to particularly direct the attention of the court to the arguments which follow hereunder, for we believe the same to be of the utmost importance and value, if not paramount to all others in deciding this case.

Assignment of error 4 (transcript of record, p. 203) relates to the admission by the trial court, over objection of counsel for plaintiff in error, of the testimony of A. C. Sullivan in reference to the unpaid claims outstanding and owing by him, alleged to have been incurred in connection with his sub-contract for the partition work in the new Lincoln High School. The testimony will be adverted to in greater detail hereafter.

Assignment of error 5 (transcript of record, p. 217) relates to the ruling of the trial court in denying the motion of plaintiff in error for a verdict and judgment on the pleadings and testimony, which motion was based upon the following grounds:

“1. That the defense of estoppel as set forth in  
 “the plaintiff’s reply was clearly established and  
 “that the defendant, Lewis A. Hicks Company, was  
 “bound by the written assignment of the Sullivan  
 “Fireproof Partition Co. to Ladd & Tilton Bank,  
 “and the acceptance thereof by the Lewis A. Hicks  
 “Company, dated the 18th day of December, 1911,  
 “and the written notification given by the said Lewis  
 “A. Hicks Company, based on the written assign-  
 “ment and acceptance, which said written notifica-  
 “tion was dated April 3, 1912, and that the facts  
 “and matters set forth in the pleadings by the de-  
 “fendant did not constitute a defense to the matter  
 “of estoppel pleaded by plaintiff.

“2. That the claims for materials furnished  
 “and labor done by the materialmen and laborers  
 “were contingent and uncertain; that the same was  
 “pleaded as a matter of defense and as damages;  
 “that the same were improper and insufficiently  
 “pleaded, and further were pleaded as uncertain and  
 “unliquidated damages and the same did not consti-  
 “tute a proper defense or any defense to the plain-  
 “tiff’s action and the testimony admitted thereon  
 “was not properly received; that the said defense  
 “and allegations thereof and the testimony thereto  
 “should be disregarded.

“3. That the materials furnished by the ma-  
 “terialmen and the labor performed by the laborers  
 “was not such as would give rise to or sustain a me-  
 “chanic’s lien in the State of Oregon.

“4. That inasmuch as the building which the  
 “Lewis A. Hicks Company had a contract to erect  
 “and was erecting was a public school building and  
 “could not be liened by materialmen or laborers, the  
 “bond which the Lewis A. Hicks Company gave to  
 “insure the performance of its contract took the  
 “place of the building for the purpose of mechanics’  
 “liens, and that if a mechanic’s lien could not have  
 “been successfully asserted against a building which  
 “would be lienable under the laws of the State of  
 “Oregon on account of materials or labor furnished,  
 “then such claim could not be successfully placed  
 “or filed against said bond, and further that no  
 “greater right or privilege was given by or could be  
 “asserted against the said bond than against a lien-  
 “able building under the laws of the State of Ore-  
 “gon.

“5. The testimony shows that all of the mate-  
 “rials furnished to the Sullivan Fireproof Partition

“Co., the sub-contractor, did not enter into the Lincoln High School building, the building which the Lewis A. Hicks Company was under contract to erect, and that under the laws of the State of Oregon relative to mechanics’ liens the various bills for labor and materials were not capable of being asserted against the bond which took the place of the building for lien purposes.

“6. That the testimony shows that the materials furnished by the various materialmen and the labor performed by the various laborers for the Sullivan Fireproof Partition Co. on account of its sub-contract with the Lewis A. Hicks Company, was furnished and performed upon the credit of the Sullivan Fireproof Partition Co. and not upon the credit of the building or upon the credit of the bond, and furthermore that none of the materials furnished the Sullivan Fireproof Partition Co. entered into the said building, but the same were used for the purpose of manufacturing a new commodity, entirely separate and distinct from the component parts thereof, and composed of the materials furnished by the various materialmen, and the whole character of the materials being changed and commingled into a new and distinct manufactured article, they lost their original character to such an extent as to be non-lienable items under the laws of the State of Oregon against the bond, the bond having taken the place of the building for the purpose of mechanics’ liens.”

In order that the examination by the court of the question here presented may be facilitated, we desire to refer briefly to the pleadings.

The complaint states that Lewis A. Hicks Company entered into a contract with School District No. 1 of Multnomah County, Oregon, for the erection of a public school building, commonly known as the Lincoln High School; and that Lewis A. Hicks Company entered into a sub-contract with the Sullivan Fireproof Partition Co. whereby the Sullivan Company was to do certain work and furnish certain materials. The Sullivan Company applied to Ladd & Tilton Bank, the plaintiff in error, for a loan for the purpose of complying with its sub-contract; but before making the loan, Ladd & Tilton Bank required an assignment of all moneys due the Sullivan Company from the Hicks Company on account of the contract price mentioned in said contract. The assignment was duly and regularly given by the Sullivan Company to Ladd & Tilton Bank, and notice thereof was served on the Hicks Company and accepted by it.

The defendant Hicks Company answered, admitting certain of the allegations of the complaint which are immaterial to the discussion of this point, and for a further answer set up the facts that the Lewis A. Hicks Company entered into the agreement with School District No. 1 for the construction of a public school building known as the Lincoln High School, and further alleges by paragraph VI. of the answer (transcript of record, pages 9, 10 and 11) that upon the demand of said School District No. 1 AND IN COMPLIANCE WITH THE LAWS OF THE STATE OF OREGON, AS SET FORTH IN PARAGRAPH 6266 OF LORD'S OREGON LAWS, THE DEFEND-



ANT, LEWIS A. HICKS COMPANY, IN CONNECTION WITH SAID CONTRACT EXECUTED ITS BOND AS PRINCIPAL IN FAVOR OF SAID SCHOOL DISTRICT NO. 1, WITH THE PACIFIC COAST CASUALTY CO. AS SURETY THEREON, of which bond (transcript of record, p. 10) the following is material. The bond recites that the Hicks Company is bound unto School District No. 1 of Multnomah County, Oregon, in the penal sum of \$160,000, conditioned that whereas the Lewis A. Hicks Company has entered into a contract with School District No. 1 of Multnomah County, Oregon, for the erection of a school building known as the new Lincoln High School, and then proceeds:

“Now, therefore, if the said contractor shall well and  
 “faithfully perform all the covenants, conditions and  
 “provisions in said contract, plans and specifications,  
 “and shall pay all claims or liens for labor, work and  
 “material on account of all sub-contractors, material-  
 “men, laborers and mechanics furnishing labor or ma-  
 “terial under said contract and all claims for damages  
 “against the owner on account of personal injury to any  
 “persons working on or about said structure, then this  
 “obligation shall be void; otherwise to remain in full  
 “force and virtue.” Said contract between School Dis-  
 trict No. 1 and Hicks is referred to in said bond and  
 made a part of same by a copy being attached thereto.

Paragraph XIII of the answer (transcript of record, page 16) alleges that the following named persons and corporations performed labor and furnished material to the Sullivan Fireproof Partition Co. to be used



and which was used in the matter of the partial construction of said building by the said Sullivan Fireproof Partition Co., under and by virtue of its contract with the defendant, and that there is now unpaid and owing to the said persons and corporations by the said Sullivan Fireproof Partition Co. on account thereof the amounts set opposite their respective names, to-wit: (Same as set forth in answer, transcript of record, p. 16.)

Paragraph XIV. alleges:

“That the Sullivan Fireproof Partition Co. is  
 “insolvent and is unable to pay to said persons and  
 “corporations the said amount of Four Thousand  
 “Four Hundred Ninety-six and Sixty-one Hun-  
 “dredths Dollars (\$4,496.61), or any part thereof,  
 “and that the said persons and corporations are  
 “claiming from the defendant under its bond so ex-  
 “ecuted to School District No. 1 of Multnomah  
 “County, Oregon, the said aggregate sum of Four  
 “Thousand Four Hundred Ninety-six and Sixty-  
 “one Hundredths Dollars, (\$4,496.61), and that a  
 “portion of said corporations have already insti-  
 “tuted an action against the defendant upon said  
 “bond and that defendant is liable for and will be  
 “compelled to pay to said persons and corporations  
 “the said sum of \$4,496.61.”

Paragraph XV alleges:

“That owing to the failure of said Sullivan Fire-  
 “proof Partition Co. to pay to said persons and cor-  
 “porations the said sum of Four Thousand Four  
 “Hundred Ninety-six and Sixty-one Hundredths  
 “Dollars (\$4,496.61), the defendant has paid all  
 “moneys due, or to become due, to said Sullivan

“Fireproof Partition Co., and that there was not at  
 “the commencement of the above entitled action, nor  
 “is there now anything due, owing or payable by the  
 “defendant to said Sullivan Fireproof Partition Co.,  
 “and that consequently there is nothing due, owing  
 “or payable from defendant to plaintiff by virtue of  
 “said order.”

Replying to the answer of the defendant, as quoted, the plaintiff denies that said bond was executed pursuant to section 6266 of Lord's Oregon Laws, or any other section of said code. The reply further denies the allegations of paragraphs XIII, XIV and XV, of the answer. Therefore, an issue was clearly made upon the pleadings as to whether or not said \$160,000 bond executed by the Hicks Company to School District No. 1 was executed pursuant to section 6266 of Lord's Oregon Laws; and in the trial of this case, there being a full transcript of all the evidence taken, as set forth in the transcript and now before this court, the Hicks Company did not undertake at any time to prove the allegation of its answer that the bond was executed pursuant to section 6266 of L. O. L. Not one particle of evidence was received on this point, and none was offered by the Hicks Company. Therefore, the defendant Hicks Company, having made this affirmative allegation, which was denied by the plaintiff, and the issues squarely presented, the burden is on the Hicks Company to prove the allegation by the preponderating evidence; and in the absence of any proof whatsoever as to said issue, we do not believe the court is empowered to find that said bond was executed pursuant to said section

6266 of Lord's Oregon Laws. Lord's Oregon Laws has other provisions relating to surety companies and the execution of bonds and we submit that the trial court is in error in picking out any one particular provision of the Oregon Code and finding that a bond was or was not given under that particular provision when no evidence on the subject was introduced. We submit that this bond of the Hicks Company must be interpreted in the light of its own language and in the language of the contract which is annexed thereto and made a part thereof, irrespective of whatever is claimed by the Hicks Company, but not sustained by the evidence, as to the effect thereon of any code provision.

It is to be especially noted that nowhere in the contract or in the bond itself is it mentioned or provided that the bond is or shall be conformable to section 6266 of L. O. L., and that at no place is it mentioned or provided that a bond shall be executed complying with the provisions of said or any code section. Therefore, we submit that in the construction of the bond, the correlative rights and duties arising thereunder are to be interpreted in the light of a voluntary instrument drawn between the parties entering into a contract.

We desire to refer the court to the defendant's exhibit "A" (being a copy of the contract between the Hicks Company and School District No. 1 relative to the construction and erection of the new Lincoln High School), as the same is set forth in the transcript of record, beginning at page 184. The contract, after making certain provisions as to the doing of the work and the manner thereof, provides on page 190 as follows:

“If at any time there shall be evidence of any  
 “lien or claim for which, if established, the owner of  
 “the said premises might become liable, and which is  
 “chargeable to the contractor, the owner shall have  
 “the right to retain out of any payment then due or  
 “thereafter to become due an amount sufficient to  
 “completely indemnify \_\_\_\_\_ against such  
 “lien or claim. Should there prove to be any such  
 “claim after all payments are made, the contractor  
 “shall refund to the owner all moneys that the latter  
 “may be compelled to pay in discharging any lien  
 “on said premises made obligatory in consequence  
 “of the contractor default.”

And on page 192 the provision relating to the bond is as follows:

“And the party further agrees to give a surety  
 “bond in the sum of One Hundred and Sixty Thou-  
 “sand and no-100 Dollars (\$160,000.00) for the  
 “faithful performance of this contract.”

It will be noted that there is no provision in the contract whatsoever relative to the contractor, Hicks Company, paying all claims incurred on account of labor and material furnished for the high school building, irrespective of whether such labor and material shall be supplied to the contractor (Hicks Company) or any sub-contractor. But the express language of the contract is: “If at any time there shall be evidence of any  
 “lien or claim for which, if established, the owner of the  
 “said premises might become liable.” The clear intent of this provision of the contract is to INDEMNIFY SCHOOL DISTRICT NO. 1 AGAINST ALL



DAMAGE which might be asserted against School District No. 1 on account of the labor and material furnished to the principal contractor, Hicks Company; and it was for the faithful performance of this contract, and particularly this provision, that the bond referred to in the answer was given. And particularly does the bond amplify and explain this when it states that if the contractor shall well and faithfully perform all the covenants, conditions and provisions in said contract, plans and specifications, and shall pay all *claims or liens* for labor, work and material on account of all sub-contractors, materialmen, laborers and mechanics furnishing labor or material, then the bond shall be void and there shall be no remedy over as against the surety.

We are endeavoring to urge upon this court that the intent of the contract, as construed from its four corners, is that the Hicks Company shall save School District No. 1 harmless from all claims and liens on the part of laborers or materialmen, and that this is the obligation which the surety in the Hicks bond has assumed; to-wit: That Hicks Company shall pay all claims and liens for labor, work or material and all claims *for damages against the owner*, School District No. 1. We submit that at no place in the contract itself between Hicks Company and School District No. 1, and at no place in the bond itself (to-wit, the bond given by Hicks to School District No. 1) is it provided or even mentioned that the contract or the bond was executed for the purpose of fulfilling any intent expressed in Lord's Oregon Laws, section 6266; and that if no claim or lien by any laborer or materialman can be asserted against School



District No. 1, either by a mechanics' lien or by a direct suit by such laborer or materialman, then the surety in the bond has discharged his contract by the faithful performance thereof; and it will be admitted that a laborer or a materialman, not being in privity of contract with School District No. 1, cannot sue School District No. 1 for any claim which he might have on account of labor or material furnished to Hicks, the contractor, or Sullivan, the sub-contractor. And it being further provided by the law of Oregon that a public building is non-lienable for labor or material, then clearly no right of action can possibly exist on the part of such laborer or materialman. It is to be especially noted that the bond given by Hicks and his surety to School District No. 1 is a bond for *indemnity against damages*, and that damages could only arise to School District No. 1 after it had been compelled to pay out something to a mechanic or materialman on account of the construction of the new Lincoln High School, and that if School District No. 1 is not compelled to make such payment it cannot claim damages and has no right of action against the surety. This being true, and it being nowhere proved in the evidence upon the issues made in the pleadings that the bond was executed to serve the purpose of the Oregon Law as expressed in section 6266 of Lord's Oregon Laws, it is submitted that if the laborer or materialman could not obtain redress for unpaid services or material furnished either to Hicks or Sullivan under the bond executed by Hicks, then the fact of the execution of the bond is immaterial in this case, and any payment which the Hicks Company made to the laborers or material-

men furnishing labor or material to its sub-contractor is a voluntary payment made without right so to do, and could not be pleaded as a defense. Upon the point under discussion we desire to refer the court to the terms of the sub-contract entered into between the Sullivan Company and the Hicks Company, as set forth in the transcript of record, at page 165; and particularly to paragraph numbered X. thereof, wherein the following provision occurs:

“The sub-contractor agrees to save and keep the  
 “said building and premises free and clear of any  
 “and all mechanics’ liens for work or labor done or  
 “materials furnished in the doing of the work speci-  
 “fied herein, and in this connection the sub-con-  
 “tractor agrees to pay promptly as they become due  
 “all sums incurred for such work or labor done or  
 “materials furnished, and in case of any default on  
 “the part of the sub-contractor, the contractor shall  
 “have the right to pay said sums, together with any  
 “additional sums the payment of which is necessi-  
 “tated by such default of the sub-contractor, either  
 “for costs, attorney’s fee or otherwise, and all sums  
 “so paid by the contractor shall be repaid by the sub-  
 “contractor, and the contractor may withhold any  
 “money due the sub-contractor until such indebt-  
 “edness is repaid and the contractor may declare  
 “this contract rescinded, resume possession of the  
 “premises, complete the work and charge the same  
 “against the sub-contractor, all in the manner and  
 “with the same rights as are provided in subdivision  
 “V hereof.”

We cannot but be impressed with the trend of thought which runs throughout the contract between

the Hicks Company and School District No. 1, the bond between the Hicks Company and School District No. 1, and the contract between Sullivan and the Hicks Company, which is, that School District No. 1 is to be saved harmless from all charges and liens which it might have to pay, and the Hicks Company as against its sub-contractor, is to be saved harmless against all liens for work or materials which might be incurred by Sullivan in the course of the performance of his contract for which the Hicks Company would be liable under its surety bond to School District No. 1.

The particular point which we are urging upon the court has been decided in the case of *Smith v. Bowman*, 88 Pac. (Utah) 867, and reported in 9 L. R. A. (N. S.), at page 889, together with an extended editor's note. In that particular case the State Agricultural College of Utah entered into a contract with the defendants Bowman & Hodder for the construction of a college building. The contract provided, as in the case at bar, that the contractor should pay all claims of laborers and materialmen and should, among other things, keep the building free from all liens or right of lien for debts due or claimed to be due from the contractor; and as security for the performance of the contract on the part of the contractor, the owner took a surety bond in the penal sum of \$22,000, which penal bond was conditioned, as in the case at bar, that the contractor would truly and well keep and perform the covenants and agreements in the contract, and further that the contractor would truly and promptly pay and discharge all indebtedness that might be incurred by him in carrying out the said

contract, and would complete the same free of all mechanics' liens, "and shall keep and perform the covenants, conditions and agreements in said contract and in the within instrument contained;" it being provided also "that the bond was made for the use and benefit of all persons who may become entitled to liens under the said contract according to the provisions of the law in such cases made and provided, and may be sued upon by them as if executed to them in proper person."

The action was brought by the plaintiff, who had supplied material to the contractor. Under the law of Utah (the state wherein the public building was to be erected) no lien could be filed against a public building. Such also is the law of the State of Oregon.

We would ask the court to read the entire opinion, as it is very illuminating upon this question. The court said:

"In determining the true intention of the parties to the bond in question, we must look not to disconnected sentences, or only a portion of a sentence, taken from the context, but we must look at the bond as a whole, and consider it in connection with the contract attached to it and for the security of which it was given. So construing it, we think it is apparent that the intention of the parties to the bond was to secure the college against claims that might be asserted against it, and for which liens might be filed, and to secure those who might become entitled to liens. There is no provision in the contract entered into between the college and the contractors whereby the latter promised or agreed to pay for material furnished to them. The parties to the bond had the undoubted right to contract



"as to who should and who should not be benefited  
 "by its obligations. They have expressed in clear  
 "terms those persons to be the agricultural college  
 "and those who may be entitled to liens. Such inten-  
 "tion is manifest by what may be called the obliga-  
 "tory portion of the bond, where it is expressly stated  
 "that the sureties are bound to the agricultural col-  
 "lege, 'as well as to all persons who may become en-  
 "titled to liens under the contract,' in a sum of  
 "money 'to be paid to the said agricultural college  
 "and to said parties who may become entitled to  
 "liens;' and in the concluding portion of the bond,  
 "where again it is expressly stated: 'This bond is  
 "made for the use and benefit of all persons who  
 "may become entitled to liens.' When the parties  
 "to the bond limited the benefits for which it was  
 "given in express terms to third parties who may  
 "become entitled to liens, to then hold that the bond  
 "shall be extended, so as to include those who are  
 "not entitled to liens, is to read a condition into the  
 "bond other than expressed by the parties, and is  
 "extending by implication the liability of the sure-  
 "ties beyond the terms of their contract, and is, in  
 "effect, making a new contract for them. But it is  
 "said, as all persons are presumed to know the law,  
 "it will be presumed that the sureties knew that un-  
 "der the statute no one was entitled to liens, and  
 "that, therefore, they must have intended to benefit  
 "those who would have been entitled to liens had the  
 "building not been a public building. The premises  
 "may be conceded, but the conclusion does not neces-  
 "sarily follow. It may well be argued that the sure-  
 "ties, mindful of the law that mechanics' liens can-  
 "not be filed against a public building and that  
 "claims of materialmen and laborers arising from



“materials furnished to or labor performed for the  
 “contractors could not lawfully be asserted against  
 “the college, and also mindful of the law that sure-  
 “ties are entitled to stand on the strict letter of their  
 “bond, signed the undertaking in question; and that  
 “they would not have signed it had it expressly se-  
 “cured the payment to those who might furnish  
 “material and labor to the contractors in no man-  
 “ner chargeable to or capable of being asserted  
 “against the college. If, on the other hand, it shall  
 “be said that the parties to the bond erroneously  
 “assumed that materialmen and laborers were enti-  
 “tled to liens, and had the right to file liens against  
 “the building, or assert claims against the college  
 “arising from material or labor furnished to the con-  
 “tractors, and, upon such assumption, secured the  
 “college against such claims and liens and those en-  
 “titled to liens, then, again, the parties can only be  
 “held to what was intended by them and the security  
 “enforced only in accordance with such intention.  
 “To say that the parties merely intended to secure  
 “the college against liens and those entitled to liens  
 “and because no lien attached and no one was enti-  
 “tled to liens that therefore the terms of the bond  
 “should be extended so as to include by implication  
 “some one else not entitled to liens, is making an-  
 “other contract for the parties. It is said by appel-  
 “lant that the parties intended to secure some one  
 “beside the agricultural college. Suppose they did.  
 “They, however, have stated who it is in very plain  
 “language. It is those who are entitled to liens. But  
 “the appellant asserts as no one was entitled to liens  
 “the parties to the bond must have meant those who  
 “might furnish material and labor to the contractor.  
 “Of course that fits the plaintiff but it does not fit

"the terms of the bond. Whom the sureties meant  
 "to be benefited is to be determined from the lan-  
 "guage which they have used; and in order that the  
 "plaintiff may be one of the class described in the  
 "bond he must bring himself within its terms. He  
 "must make himself fit the class, not make the class  
 "fit him. What the appellant in effect asserts is that  
 "the sureties conditioned their liabilities to third par-  
 "ties who were entitled to liens when no one was en-  
 "titled to such right; and since they assumed the lia-  
 "bility only to the college for a faithful performance  
 "of the contract and to hold it harmless but assumed  
 "no real liability to third parties, therefore the un-  
 "dertaking should be so construed as to make them  
 "assume the liability to such persons. This is mere-  
 "ly another way of saying that courts may not only  
 "enforce but also create liabilities. The sureties to  
 "the bond had the right to contract that it should be  
 "exclusively for the benefit of the college and alone  
 "to indemnify it. They also have the right to con-  
 "tract that it should be for the benefit of only partic-  
 "ular third parties and when such specification has  
 "been made in words and language free from ambig-  
 "uity and which convey a definite meaning there is  
 "no occasion for interpretation but the language  
 "should be given effect according to its natural and  
 "obvious meaning.

"Appellant also strongly relies on the stipula-  
 "tions in the bond that the contractors shall abide by  
 "and shall perform the covenants and agreements of  
 "the contract entered into between them and the col-  
 "lege; and 'shall duly and promptly pay and dis-  
 "charge all indebtedness that may be incurred' by  
 "the contractors 'in carrying out the contract and  
 "to complete the same free of all mechanics' liens;'

“and shall perform the covenants and agreements of  
 “the contract in time, manner and form as therein  
 “specified, especially the clause, ‘shall pay and dis-  
 “charge all indebtedness incurred by the contractor  
 “in carrying out the said contract,’ from which, it is  
 “urged, that the language there used is broad  
 “enough to include a promise to pay for material  
 “furnished to and used by the contractors in the  
 “construction of the building. Considering the  
 “clause standing alone, there is some force to the  
 “contention. But, as before observed, in construing  
 “the terms of a contract, the ruling intention of the  
 “parties is to be determined, not from any one or  
 “several stipulations in the contract disconnected  
 “from all others, but it is to be determined from all  
 “the language which the parties have used and from  
 “a consideration of the whole contract. When the  
 “clause is construed with context, and in connection  
 “with what precedes and what follows it, no such  
 “meaning as is contended for by appellant can be  
 “given it. The payment and discharge of the in-  
 “debtedness specified are referable to the contract  
 “entered into between the contractors and the col-  
 “lege, but therein the contractors did not promise  
 “or agree to pay any indebtedness arising from ma-  
 “terials or labor furnished them or for materials  
 “furnished for or labor performed on the  
 “building; nor did they agree to pay any in-  
 “debtedness, except such as should be asserted  
 “against the college and for which liens could be  
 “filed. By the expression, ‘shall pay and discharge  
 “all indebtedness incurred in carrying out the con-  
 “tract,’ the parties clearly meant the indebtedness of  
 “claims which could be asserted against the college  
 “and for which liens could be filed. It cannot be

"construed to mean an express covenant to pay ma-  
 "terialmen or laborers unconditionally. *Montgom-*  
 "ery v. Rief, 15 Utah, 495, 50 Pac. 623. From a  
 "consideration of all the provisions of the bond, and  
 "in connection with the contract which it was given  
 "to secure, it is our opinion that the bond was taken  
 "to indemnify and save the agricultural college  
 "harmless from claims and liens and those entitled  
 "to liens. The parties having thus expressed them-  
 "selves unambiguously, we can see no reason why  
 "this court should strain after reasons for thwart-  
 "ing their obvious purpose in an endeavor to read  
 "someone into the bond not intended to be benefited  
 "by it. Though a promise had been made to pay  
 "for materials, yet if, from the whole bond, such  
 "promise was made only for the purpose of saving  
 "the agricultural college harmless and to indemnify  
 "it against loss or damage, and not for the benefit  
 "of parties who might furnish material, and that  
 "such was the ruling intention of the parties, then  
 "the sureties cannot be made liable to parties who  
 "furnished material, for the reason that the ruling  
 "intention of the parties must govern. *Parker v.*  
*Jeffrey*, 26 Or. 186, 37 Pac. 712. In the case of  
 "*Electric Appliance Co. v. United States Fidelity*  
 "*& G. Co.*, 110 Wis. 434, 53 L. R. A. 609, 85 N.  
 "W. 648, the contractors in their contract agreed  
 "with a city to deliver the structure free and clear  
 "of all claims or liens for labor performed and ma-  
 "terials furnished; and that before final payment  
 "the contractors should produce receipts for all la-  
 "bor performed and materials furnished, and agreed  
 "to furnish a bond to the city, not only for the faith-  
 "ful performance of the contract, but for the pay-  
 "ment of all claims for labor and materials. The



"bond accepted by the city, however, omitted this  
 "latter provision, and was conditioned only for the  
 "faithful performance of the contract. The statute  
 "there giving mechanics' liens did not extend to and  
 "could not be enforced against buildings and real  
 "estate of municipal corporations held for public  
 "use; nor was the city there liable for the claims of  
 "laborers or materialmen. In denying the right of  
 "materialmen to enforce the security, the court ob-  
 "served that 'the fact that the city expressly con-  
 "tracted that the bond given should be for the pay-  
 "ment of materialmen and laborers, and  
 "then accepted a bond without such a condition, is  
 "clearly a waiver of that condition of the con-  
 "tract, and indicates an intention to aban-  
 "don or relinquish its scheme in that re-  
 "spect.' These cases but illustrate the princi-  
 "ple that the liability of a surety on his bond is en-  
 "tirely dependent upon his covenants and agree-  
 "ments so construed as not to extend the liability  
 "by implication beyond the terms of his contract.  
 "In the cases cited by the appellant, where no right  
 "of lien was given materialmen and laborers, and  
 "where they were permitted to enforce the security,  
 "we find express agreements and covenants made  
 "on the part of the sureties to pay for material and  
 "labor, and the bond given for the benefit of such  
 "persons. We find no such intention expressed in  
 "the bond, nor in the contract before us."

We refer the court to the case of *Hunt v. King*, 97  
 Iowa 88, 66, N. W. 71, where a public building was be-  
 ing erected for the county and a surety bond was given  
 to insure the performance of the contract free and clear  
 of all liens, charges or claims on the part of the sub-



contractors, laborers or materialmen. The court said that a bond to secure the performance of a contract for the construction of a county building, conditioned upon the execution by the contractor of a satisfactory certificate, and that no mechanics' liens or other claims are chargeable to the county, does not make the bondsman liable for any debt of the contractor for materials used in the construction of the building. It said:

“The county has only contracted against payment when there are liens or claims chargeable to it. Would it be contended that the county could avoid payment to King, because material or labor was not paid for, if it conceded that claims therefor were not chargeable to it. The contract could bear no such construction, because of the definite language used. We do not discover a word to indicate the purpose of the county to protect others than itself from loss because of payments made. The provisions are against liens or claims chargeable to it.”

In the case at bar we do not find a syllable to show that the bond executed by Hicks with his surety is executed pursuant to section 6266 of Lord's Oregon Laws, nor any intention, express or implied, that the bond is to secure anyone other than School District No. 1. We submit that the reasoning in the last cited case is very pertinent.

In the case next cited, where a bond, conditioned that the contractor should perform the contract and all the covenants and conditions therein contained and pay and discharge from said premises all liens of materialmen,

laborers or otherwise, which might accrue on account of said building contract, was given to the Board of Education to secure the performance of a contract for the construction of a school house, it was said that there was no breach of said bond, so far as the Board was concerned, where liens could not be filed upon the property, even though the contractor failed to pay for a portion of the labor and material used in its construction.

Spaulding Lumber Co. v. Brown, 171 Ill. 487,  
49 N. E. 725.

The principles and the conclusions expressed in the cases herein set out have been discussed and agreed upon in the following cases:

Montgomery v. Reif, 15 Utah, 495, 50 Pac. 623.  
Simonson v. Grant, 36 Minn. 439, 31 N. W. 861.  
Green Bay Lumber Co. v. Independent School  
District, Iowa, on rehearing, a former judgment being reversed, 121 Iowa, 663, 97 N. W.  
72.

Editor's note, 9 L. R. A. (new series) 889.

We submit to the court that, considering the language of the contract between the Hicks Company and School District No. 1, "If at any time there shall be "evidence of any lien or claim for which, if established, "the owner of the said premises might become liable," and further considering the bond given to secure the performance of said contract, and the said condition, "If the said contractor shall well and faithfully perform "all covenants, conditions and provisions in said contract, plans and specifications, and shall pay all claims

“or liens for labor, work and material on account of all “sub-contractors, materialmen, laborers and mechanics “furnishing labor or material,” and considering the language of the contract between the Hicks Company and the Sullivan Company wherein “the sub-contractor “agrees to save and keep the said building and premises “free and clear of any and all mechanics’ liens for work “or labor done or material furnished in the doing of the “work specified herein,” the clear intent of School District No. 1, the owner of the property, was to save itself free and harmless from all charges, claims or liens, and that the intent of the Hicks Company, as between it and its sub-contractor Sullivan, was to save the Hicks Company free and clear of all charges, claims or liens on the part of any work; and considering the obligation of the bond that it was to save harmless School District No. 1 from these various things, and then further considering the fact that Hicks could not offset or counterclaim as against Sullivan’s assignee, Ladd & Tilton Bank, for the amount of these claims unless they are directly chargeable under his bond, the reception of all evidence based on such claims and the liability therefor of the Hicks Company was erroneous, and, as the consideration thereof was the foundation of the court’s opinion and judgment, that the decision of the trial court ought to be reversed.

Section 6266 of Lord’s Oregon Laws has been construed by the Supreme Court of the State of Oregon to this effect: That the bond, being statutory, should be strictly construed, and sureties thereon have a right

to demand that the claimant shall bring himself fairly within its terms.

School District No. 6 v. Smith, 63 Or. 586, decided November, 1912.

We submit to the court that if this action had been brought against the surety company, the defense we are making would have been available to it; and whatever grounds of defense the surety company may have as to its liability on the bond at the instance of a suit by School District No. 1 or the Hicks Company, the same defense is pertinent to Ladd & Tilton Bank; for if the surety is not liable, then the Hicks Company is not authorized to pay these other claims and cannot assert the same as an offset or counterclaim to Ladd & Tilton's demand.

Inasmuch as the assignments of error now being discussed comprehend several phases, we desire to submit to the court our argument based upon another ground, demonstrating why the judgment of the lower court was erroneous and ought to be reversed.

Objection was made by the plaintiff in error to the admission of all testimony on the part of the defendant relative to unpaid bills incurred by the Sullivan Company in connection with its work on the new Lincoln High School. It is to be noted by the defendant's answer, paragraph XII. (transcript of record, page 15), that the Hicks Company paid out \$214.99 by virtue of



a writ of garnishment served on it in a suit entitled Roebblings Sons Company v. Sullivan Fireproof Partition Co. It is to be further noted that by paragraphs XIII, XIV and XV of the answer (transcript of record, pages 16 and 17) defendant alleges that various laborers and materialmen furnished labor and material to the Sullivan Fireproof Partition Co. in the course of its work done under its sub-contract to the extent of \$4,496.61, and that said laborers and materialmen are claiming from the Hicks Company the amount thereof, and the defendant is liable and will be compelled to pay said sum. It will be noted from the allegations of the answer above referred to that no part of said sum of \$4,496.61 claimed by the laborers and materialmen supplying labor and material to the sub-contractor Sullivan *has been paid* by the Hicks Company. On the contrary, it is alleged that it *has not been paid*, but that *the Hicks Company will be liable for the said amount in the future*. And the testimony adduced at the time of the trial on behalf of the defendant (transcript of record, pages 111 to 122 inclusive) conforms to the allegations of the answer in so far as it shows that the sums comprising this \$4,496.61 have not been paid by the Sullivan Company or the Hicks Company, and therefore the defendant concludes, without proof or testimony thereto, *that it will be in the future* liable for the full amount of each of said claims. Objection was made by the plaintiff to the reception of all such testimony, which was overruled by the court (transcript of record, p. 48 and p. 62), the essence of the objection being that the claims to which the testimony referred were uncertain and unliquidated;



and, further, that the same had been improperly pleaded; and, further, that the same did not constitute proper items of setoff as against the plaintiffs' demand.

Counsel for plaintiff in error contended at the time of the trial, and now contends, that the Hicks Company should have reduced all the claims for labor and materials set forth in its answer to a definite and fixed amount, and that payment thereof should have been made by the Hicks Company, before the same could be pleaded as an offset to the plaintiff's demands. The argument upon this point embraces two theories, the first being that the Hicks Company, by the stipulation in its contract and the bond executed, was to be indemnified against *damages* and was not to be indemnified against *liability*, and that therefore the Hicks Company had no defense on account of such claims until it had been damaged by the payment of moneys to its materialmen and laborers, and that it was not damaged by the mere assertion of the claims, and that the mere assertion thereof was not sufficient to support a counterclaim.

The other theory of the objection was and is that the greater portion of the claims of the laborers and materialmen furnishing labor and material to Sullivan, the sub-contractor, was not for work, labor and material furnished to the Sullivan Company in connection with its contract on the new Lincoln High School, but was for work, labor and material partially furnished to other buildings and therefore not a proper counterclaim on the part of Hicks.

The first theory of the objection will be discussed at this time. The second is more logically comprehended in the argument which follows later.

To make relevant our argument that Hicks was to be indemnified against damages and not against liability we refer to the terms of the contract.

Paragraph 3 of Article IX. of the contract entered into between the Hicks Company and School District No. 1 (transcript of record, page 190) is as follows:

“If at any time there shall be evidence of any  
 “lien for which, if established, the owner of the said  
 “premises might become liable, and which is charge-  
 “able to the contractor, the owner shall have the  
 “right to retain out of any payment then due or  
 “thereafter to become due an amount sufficient to  
 “completely indemnify \_\_\_\_\_ against such  
 “lien or claim. Should there prove to be any such  
 “claim after all payments are made, the contractors  
 “shall refund to the owner all moneys that the latter  
 “may be compelled to pay in discharging any lien  
 “on said premises made obligatory in consequence of  
 “the contractor default.”

Paragraph X. of the sub-contract entered into between the Hicks Company and the Sullivan Company (transcript of record, page 175) is as follows:

“The sub-contractor agrees to save and keep the  
 “said building and premises free and clear of any  
 “and all mechanics’ liens for work or labor done or  
 “materials furnished in the doing of the work speci-  
 “fied herein, and in this connection the sub-con-  
 “tractor agrees to pay promptly as they become due  
 “all sums incurred for such work or labor done or

“materials furnished, and in case of any default on  
 “the part of the sub-contractor, the contractor shall  
 “have the right to pay said sums, together with any  
 “additional sums the payment of which is necessi-  
 “tated by such default of the sub-contractor, either  
 “for costs, attorney’s fees or otherwise, and all sums  
 “so paid by the contractor shall be repaid by the sub-  
 “contractor, and the contractor may withhold any  
 “money due the sub-contractor until such indebted-  
 “ness is repaid, and the contractor may declare this  
 “contract rescinded, resume possession of the prem-  
 “ises, complete the work and charge the same against  
 “the sub-contractor, all in the manner and with the  
 “same rights as are provided in subdivision V here-  
 “of.”

We desire to call the attention of the court to the  
 pertinent language of the paragraph just quoted, which  
 is, “the sub-contractor agrees to pay promptly as they  
 “become due all sums incurred for such work or labor  
 “done or materials furnished, and in case of any default  
 “on the part of the sub-contractor the contractor *shall*  
 “*have the right to pay said sums, together with any addi-*  
 “*tional sums the payment of which is necessitated by*  
 “*such default of the sub-contractor, either for costs, at-*  
 “*torney’s fees or otherwise, and all sums so paid by the*  
 “*contractor shall be repaid by the sub-contractor, and*  
 “*the contractor may withhold any money due the sub-*  
 “*contractor until such indebtedness is repaid.*”

The very clear unambiguous meaning of this clause  
 of the contract is that if the sub-contractor (the Sullivan  
 Company) *does not pay the claims* of laborers, the con-  
 tractor (the Hicks Company) might do so and offset

such claims against all moneys which may be due from the contractor to such sub-contractor, the very material point being that the contractor (Hicks Company) did not reserve the right to offset against the moneys due the Sullivan Co. the claims for laborers and material-men, which might be filed, but only those which the Hicks Company was compelled to pay, and that the Hicks Company is not damaged until it has made such payment. Our contention is that the reserved right in the Hicks Company is the right to offset as *against damages alone* and not as *against liability*, and that therefore the reception of any evidence tending to show a liability, or a claim, which has not been liquidated or paid, was clearly incompetent; and that as the reception of such evidence formed the basis of the trial court's judgment, manifest error was committed in receiving the same.

In support of our contention we refer the court to the case of *Henry v. Hand*, 36 Ore. 492, in which the opinion of the court was rendered by Chief Justice Wolverton. We quote from his opinion, beginning at page 495:

"The questions involved in this controversy arise  
 "entirely upon the court's instructions to the jury.  
 "The defendant's theory is that the simple filing of a  
 "claim did not constitute a lien, within the purview  
 "of the bond, and did not afford legal justification  
 "on the part of the owner as against the sureties, for  
 "withholding the last payment after it became due.  
 "The question as to when the payment became due,  
 "under the evidence, was left to the jury; but they  
 "were instructed that when due it was the duty of



“the owner to pay, notwithstanding claims of lien  
 “had been filed, provided suits had not been insti-  
 “tuted for their foreclosure, and, even if suits had  
 “been commenced which the payment would have  
 “stopped, it was his duty to make it then; that he  
 “could not hold the money and hold the sureties too,  
 “contrary to the terms of the contract. On the part  
 “of the plaintiff, it is contended that the bond in the  
 “suit is, in effect, one of indemnity against liability,  
 “and that a breach thereof by reason of a failure to  
 “keep the building free from mechanics’ or other  
 “materialmen’s liens for thirty-five days entitled the  
 “owner to recover the amount of such liens against  
 “the sureties, whether he had discharged them or  
 “not; while, on the other hand, it is claimed that the  
 “liability for damages does not arise in favor of the  
 “owner until he has been actually damnified, or un-  
 “til he has been compelled to, or has paid or dis-  
 “charged such liens; that the bond is, in effect, one  
 “of indemnity against damages, rather than against  
 “liability. And in this view we concur. “There is a  
 “marked analogy between this undertaking and a  
 “covenant that premises are free from incum-  
 “brances, or that the purchaser shall enjoy them free  
 “from incumbrances. This sort of covenant is dis-  
 “tinguished from one to discharge incumbrances;  
 “the distinction being that in the former instance no  
 “recovery can be had unless some damage is shown  
 “to have been inflicted, except it be of a nominal  
 “character. But where the covenant is to do a par-  
 “ticular thing in exoneration of the covenantee, or to  
 “indemnify him against liability, the right of action  
 “is complete as soon as there is a failure to perform,  
 “or the liability has been incurred: Rawle, Cov.  
 “Title, p. 93.



"Haas v. Dudley, 30 Ore. 355 (48 Pac. 168),  
 "where there was an agreement to assume and pay  
 "an incumbrance and to save the grantor harmless,  
 "it is a good illustration of an undertaking to do a  
 "particular thing, and that the liability for the pay-  
 "ment of the incumbrance became fixed when it fell  
 "due, whether it had been discharged by the grantor  
 "or not. So with an indemnity against liability. When  
 "the liability arises, damages are recoverable, to the  
 "extent of the liability, whether it has been dis-  
 "charged by the obligee or not. But 'the covenant  
 "against incumbrances \* \* \* is yet,' says  
 "Rawle, 'as respects the measure of damages, treat-  
 "ed purely as a covenant of indemnity; and it is well  
 "settled that if the incumbrance has inflicted no ac-  
 "tual injury upon the plaintiff, and he has paid  
 "nothing toward removing or extinguishing it, he  
 "can obtain but nominal damages as it is considered  
 "that he shall not be allowed to recover a certain  
 "compensation for running the risk of an uncertain  
 "injury.' Rawle, Cove. Title p. 288. See also De-  
 "LaVergne v. Norris, 7 Johns 358 (5th Am. Dec.  
 "'281); 8 Am. & Eng. Enc. Law (2nd Edition) p.  
 "'181. So it has been held in this state that 'a cove-  
 "nant against incumbrances is broken so as to entitle  
 "the grantee to at least nominal damages, if at its  
 "date there was an outstanding incumbrance on the  
 "property not excepted from the operation of the  
 "covenant; and, where the grantee pays off an in-  
 "cumbrance not excepted from the covenant, the  
 "amount so paid may be recovered from the grantor,  
 "less whatever the grantee may have agreed to pay  
 "for that purpose.' Corbett v. Wrenn, 25 Ore. 305  
 "(35 Pac. 658). The undertaking in question is to  
 "keep the structure free from all mechanics', ma-

“terialmen’s or other liens. It is of the same nature  
 “as a covenant that the purchaser shall enjoy the  
 “premises free from incumbrances, and of like char-  
 “acter as the undertaking in *Cochran v. Selling*, 36  
 “Ore. 333 (59 Pac. 329), to ‘save harmless against  
 “the payment of any and all (existing) claims and  
 “demands, of whatever kind or nature,’ which was  
 “held to constitute an indemnity against damages,  
 “and not against liability. It is apparent, there-  
 “fore, that the owner was not entitled to recover, as  
 “against the obligors in the bond, the full amount  
 “of the liens claimed as soon as they became estab-  
 “lished under the law as liens upon the building and  
 “that it was necessary for him to pay off and dis-  
 “charge the same before he could recover more than  
 “nominal damages for the breach.”

Also see 27 Cyc. 309, where it is said:

“A bond to protect against liens is usually con-  
 “sidered to contemplate indemnity against damage  
 “rather than against liability, and hence the owner  
 “is not entitled to recover as against the obligors in  
 “the bond the full amount of the liens claimed as  
 “soon as they become established under the law as  
 “liens upon the building, but it is necessary for him  
 “to pay off and discharge the liens before he can  
 “recover more than nominal damages for a breach  
 “of the bond.”

See also: :

*Carson Opera House v. Miller*, 16 Nev. 327.

*Church v. Conlin*, 11 Pa. Superior Court, 413.

8 Am. & Eng. Enc. of Law, 2nd Ed., p. 180.

As further substantiating the point being urged, we refer the court to the bond executed by the Lewis A. Hicks Company as principal, with the Pacific Coast Casualty Co. as surety, to School District No. 1 (transcript of record, p. 11), wherein it is provided that if the contractor shall pay all claims or liens for labor, work and material on account of all sub-contractors, materialmen, etc., then the obligation shall be void. We submit that this is further confirmatory of our view that the covenant of the contract between Hicks and School District No. 1, and the covenant in the sub-contract between Sullivan and Hicks, and the provision in the bond referred to, is a covenant *against damages*, and is not a covenant *against liability*, and that before such claim can be asserted, either as against the Sullivan Company or its assignee, Ladd & Tilton Bank, damage must have been incurred by Hicks Company; and that damage can only have been incurred by the *payment* of a proper claim, and not merely by the *filing* of such a claim. We submit that the covenants in the contracts and bond above referred to are covenants against damage and not against liability, and that therefore any evidence offered or received in reference to claims not paid or liquidated by the Hicks Company was not proper and could not be considered a proper subject of offset as against the Sullivan Company or its assignee, Ladd & Tilton Bank, and that the trial court committed error in receiving the same.

The assignments of error under discussion contain further reversible error based on the following facts and law.

Conceding, for the purposes of argument under this sub-head, that the bond executed by Hicks as principal and the Pacific Coast Casualty Company as surety to School District No. 1 was executed pursuant to section 6266 of L. O. L., and conceding that the defendant offered testimony which would prove the same, we desire to submit that the reception of any evidence relative to the unpaid claims of laborers and materialmen furnishing labor and material to the sub-contractor Sullivan was incompetent, irrelevant and immaterial, and therefore error.

The law of Oregon is that a public building is not subject to mechanics' or materialmen's liens. There is no statutory enactment to this effect, but the Supreme Court of this state has announced the rule on grounds of settled public policy. We refer to the cases of Portland Lumbering & Manufacturing Co. v. School District No. 1, 13 Ore. 283, and Benbow v. The James Johns, 56 Ore. 554, where this rule is announced and affirmed.

The legislative assembly of Oregon, in 1903, recognized that mechanics' liens could not be filed against public buildings, and in its desire to make a substitute therefor, for the benefit of laborers and materialmen, enacted what is known and has been referred to in this brief as section 6266 of L. O. L., the same being as follows:

“Hereafter any person or persons, firm or corporation, entering into a formal contract with the  
“State of Oregon, or any municipality, county, or



“school district within said state, for the construc-  
 “tion of any buildings, or the prosecution and com-  
 “pletion of any work, or for repairs upon any build-  
 “ing or work, shall be required before commencing  
 “such work, to execute the usual penal bond with  
 “good and sufficient sureties, with the additional ob-  
 “ligations that such contractor or contractors shall  
 “promptly make payments to all persons supplying  
 “him or them labor or materials for any prosecution  
 “of the work provided for in such contracts; and  
 “any person or persons making application therefor,  
 “and furnishing affidavit to the proper officer of  
 “such state, county, municipality or school district  
 “under the direction of whom said work is being or  
 “has been prosecuted, that labor or materials for the  
 “prosecution of such work has been supplied by him  
 “or them, and payment for the same has not been  
 “made, shall be furnished with a certified copy of  
 “said contract and bond, upon which said person  
 “or persons supplying such labor or materials shall  
 “have a right of action, and shall be authorized to  
 “bring suit in the name of the State of Oregon, or  
 “any county, municipality or school district within  
 “such state for his or their use and benefit against  
 “said contractor and sureties, and to prosecute the  
 “same to final judgment and execution.”

So far as we are advised, the foundation of such leg-  
 islation was laid by the United States government, the  
 rule of law being that buildings belonging to the federal  
 government were not lienable by laborers or material-  
 men. Thereupon, in 1894, Congress enacted a statute  
 referred to as the Act of August 13, 1894, c. 280, 28  
 Stat. 278, U. S. Compiled Statutes 1901, p. 2523, now



amended by Act. of February 24, 1905, c. 778, 33 Stat. 811, U. S. Compiled Statutes 1901, p. 709. Upon this federal enactment is based the Oregon law, which is similar in the language used.

The basis of the argument which we desire to submit to the court upon this point is primarily founded upon the following contention: Laborers and materialmen not having a lien against a public building for labor or material furnished therefor, in lieu of the building against which mechanics' liens can be filed, Oregon has provided that a surety bond shall be given by the subcontractor and that the rights and remedies of laborers shall be had against such bond in lieu of all rights and remedies against a lienable building, and, further, that the rights and claims of laborers can only be asserted against a bond which has taken the place of a lienable building in cases where those rights are lienable rights under the general mechanics' and materialmen's lien laws of the state. Inasmuch as the Congressional enactment has received the construction of the Supreme Court of the United States, we will briefly advert thereto.

In the case of *United States for the Use of Hill v. American Surety Company*, 26 Sup. Ct. Rep. (U. S.) 168, Mr. Justice Day said (at page 170):

“As against the United States, no lien can be  
 “provided upon its public buildings or grounds, and  
 “it was the purpose of this act **TO SUBSTITUTE**  
**“THE OBLIGATION OF A BOND FOR**  
**“THE SECURITY WHICH MIGHT OTH-**  
**“ERWISE BE OBTAINED BY ATTACH-**  
**“ING A LIEN TO THE PROPERTY OF**

**"AN INDIVIDUAL.** The purpose of the law "is, as its title declares: 'For the protection of persons furnishing materials and labor for the construction of public works.' If literally construed, "the obligation of the bond might be limited to secure only persons supplying labor or materials directly to the contractor, for which he would be "personally liable. But we must not overlook, in "construing this obligation, the manifest purpose "of the statute to require that **MATERIAL AND "LABOR ACTUALLY CONTRIBUTED TO "THE CONSTRUCTION OF THE PUBLIC "BUILDING SHALL BE PAID FOR, AND "TO PROVIDE A SECURITY TO THAT "END."**

In referring to this Congressional enactment, the Supreme Court of the United States, in the case of *U. S. Fidelity & Guaranty Co. v. United States*, 24 Sup. Ct. Rep. 142, through Mr. Justice Brown, said:

"Inasmuch as neither the contractor nor his sub-contractor can secure themselves by a mechanic's "lien upon the proposed building, the government, "solely for the protection of the latter, requires a "covenant for the prompt payment of his claims and "the same security that it requires for the performance of the principal contract. In this covenant "the surety guarantees nothing to the principal obligee,—the government,—though the latter permits an action upon the bond for the benefit of the "sub-contractors. The covenant is made solely for "their benefit. The guarantor is ignorant of the parties with whom his principal may contract, the "amount, the nature and the value of the materials

“required as well as the time when the payment for  
“them will become due.”

The same construction was announced and affirmed in the case of *Smith v. Mosier*, 169 Fed. 430.

Also in the case of *United States v. Ansonia Brass & Copper Co.*, 31 Sup. Ct. Rep. 49.

We submit that the State of Oregon did not desire any of its citizens or artisans to be deprived of a right because of doing work for the state on public buildings, which they would otherwise have for work performed or materials furnished for buildings privately owned and for which they could make the owner of the premises responsible for the default of his agent or subcontractor; but by virtue of the state's announcement, as a portion of its public policy, that its public buildings could not be liened, the state enacted what is known as section 6266 of L. O. L., which, so far as we are able to ascertain, is for the purpose of giving to laborers and materialmen upon public buildings the same degree of protection as was given to them as against private buildings. In other words, instead of the building the law provided for a bond which took the place of the building, and against which mechanics' liens could be filed whenever the laborer or the materialman had a lienable item. But if the construction as contended for by the attorney for the defendant is given to section 6266 of L. O. L., then all those who perform labor or furnish material to a public building are in a more advantageous position and can reap greater benefits than can the same man who furnishes labor or material to a structure pri-

vately owned. We desire to submit to the court that section 6266 L. O. L. and the bond authorized to be given thereunder, take the place of a privately owned building for the protection of laborers and materialmen who may have claims on account thereof. If our premises are correct, then the laborers and materialmen who furnished work and labor to the sub-contractor Sullivan could have a claim against the bond executed by Hicks and his surety only when such laborer or materialman had a claim for which the laws of Oregon would authorize him to file a mechanic's lien against a structure privately owned; and, further, that if a laborer or a materialman had a claim in the case at bar which could not be the subject of a mechanic's lien if the structure being erected by Hicks was a privately owned building, then such claim could not be successfully asserted against the bond and its surety. The rule of law adopted in Oregon, for which sustaining authorities will be cited later, is that the mechanics' lien laws of this state are in derogation of the common law and should be strictly construed, and that where a lien is filed which contains claims for lienable and non-lienable items lumped together, the whole of the lien must fall and there is no enforceable remedy of the lienor against the premises, even though his claim, if properly segregated, contains proper lienable items. The lien laws of the State of Oregon are set forth in section 7416 of Lord's Oregon Laws, et seq.

If we are correct in our premises, let us apply the general lien law of the State of Oregon to the various items comprising the four thousand four hundred and ninety-six and 61-100 dollars which the defendant sets



forth as a counterclaim to plaintiff's cause of action, because defendant contends that it has to pay these claims irrespective of merits by virtue of the bond; and we contend that if the bond takes the place of the building for the purpose of the liens, then liens can only be successfully asserted as against the bond when the claims are actual lienable items under the general laws of the state.

We refer to the testimony as it was given in the bill of exceptions (transcript of record, beginning at page 47 and ending on page 61); also to the same testimony as set forth in the evidence (transcript of record, beginning at page 111 and ending on page 129); and also to the same testimony as set forth in the assignments of error (transcript of record, beginning at page 204 and ending at page 217).

The first claim is that of the Acme Cement Plaster Company (transcript of record, page 47). Witness, A. C. Sullivan. Questions by Mr. Thomas:

"Q. I will call your attention to the claim of the "Acme Cement Plaster Company. Will you look at the "book and see if there is anything there in connection "with the Acme Cement Plaster Company?

"A. Yes, sir, the books shows we are owing them "\$836.55.

"Q. What was that for?

"A. It was for plaster.

"Q. Where was the plaster used?

"A. It was used in making blocks.

"Q. And those blocks were used in the Lincoln "High School?

"A. Lincoln High School building.

"Q. Has this sum of \$836.55 been paid?



"A. No, sir

"Q. That is still due the Acme Cement Plaster Company?

"A. Yes, sir.

Cross examination by Mr. Hunt (transcript of record, page 60.)

"Q. Do you know whether or not any material "was furnished by these parties that went into blocks, "which blocks were placed in any other buildings and "other places, other than the Lincoln High School?

"A. Yes, we had a surplus number of blocks from "the school that were taken away and used on the Smith "Hotel Building.

"Q. Where is that?

"A. I think called it Sixth and Main, if I remember right.

"Q. That is in the City of Portland?

"A. City of Portland, yes, sir.

"Q. About how many was that, do you know?

"A. Probably about ten thousand feet."

And further (transcript of record, page 158): Witness A. C. Sullivan. Questions by Mr. Hunt.

"Q. When you were manufacturing blocks in the "City of Portland at the time mentioned in the complaint "and referred to in the evidence, did you have any other "contracts for the furnishing of blocks for other build- "ings?

"A. While we were working on the school?

"Q. Yes.

"A. Yes, we had one with the Smith Hotel Build- "ing.

"Q. Any other?

"A. Well, we were furnishing some small orders. Just—not under contracts but under orders given to us.

"Q. Will you please state whether at the time you were manufacturing blocks for the Lincoln High School, you were manufacturing blocks from the same material for other jobs.

"A. Well, sir, when we got this Smith Hotel Building, we figured on using what three-inch blocks were being made at the plant at the High School, to put into the Smith Hotel. It was an outlet that was provided for these three inch blocks, which had to be made in making the six inch blocks.

"Q. Was it your intention at the time you were manufacturing blocks for the Lincoln High School to manufacture other blocks to keep in stock as future reserve?

"A. \* \* \* \* Well, at the time they were made, they were not intended particularly for stock; we intended to sell them if we could. It happens that we still have some of them in stock.

"Q. Did you manufacture more blocks at this time than you knew would be necessary to put in the Lincoln High School?

"A. Well, we made more of those three inch blocks than we knew would be used. We didn't make any more other sizes than supposed to go in the school."

The contention of the plaintiff in error upon the claim of the Atlas Cement Plaster Company is that under the general lien laws of the State of Oregon the Acme Cement Plaster Company would not have a lien against the Lincoln High School Building if the same were lienable under the general laws of the State of Oregon.

The Supreme Court has announced that the test of lienability is use, and there could not be a lien unless the material had benefited the owner by being consumed in the construction of the building; and where materials are furnished to the contractor and only a part of them are used in the construction of the building, the rest being transferred to other places and uses, a lien can be enforced only for the part that benefits the owner of the building.

Fitch v. Howitt, 32 Ore. 396, 52 Pac. 192.

Harrisburg Lumber Co. v. Washburn, 29 Ore. 164, 44 Pac. 390.

Therefore, based on the foregoing rule of law adopted in this state, the Acme Cement Plaster Company could only file or claim a lien for the material which it supplied to Sullivan and which went only into the building against which the lien is being asserted. As the corollary of this rule, we refer the court to another, which is that where the notice of the lien states a lump sum and part of the material furnished was used for the building and part not, no lien will attach to the property.

Dalles Lumber Co. v. Woolen Mfg. Co., 3 Ore. 527.

Kezartee v. Marks, 15 Ore. 529, 16 Pac. 407.

Williams v. Toledo Coal Co., 25 Ore. 426, 36 Pac. 159.

Allen v. Elwert, 29 Ore. 444, 44 Pac. 824.

Hughes v. Lansing, 34 Ore. 124, 55 Pac. 95.

We submit that if the Acme Cement Plaster Company cannot segregate the material furnished by it to

the sub-contractor Sullivan and which went into the Lincoln High School building, from that which entered into the Smith Hotel and other buildings and to create a reserve stock for the sub-contractor Sullivan, then its claim must fall and it would have no right to a lien and no action against the bond, and therefore Hicks would not become liable on account thereof, and the claim of the Acme Cement Plaster Company cannot be asserted by Hicks as a counterclaim to the action brought by Ladd & Tilton Bank, and the Acme Cement Plaster Company is relegated to its claim and cause of action against the Sullivan Company.

Continuing the testimony in reference to these items, we refer to the transcript of record, page 113. Witness, A. C. Sullivan. Questions by Mr. Thomas:

“Q. Now will you refer to the Atlas Mixed Mortar Company.

“A. We are owing them \$121.30.

“Q. What for?

“A. For sand and hauling.

“Q. In what connection?

“A. The Lincoln High School.

“Q. Has that been paid?

“A. No, sir.”

Cross examination by Mr. Hunt (transcript of record, page 122):

“Q. And what was the Atlas Mixed Mortar Company?

“A. That was sand and hauling.

“Q. Can you segregate the two items?

“A. Well, hardly, I should say about half and half.

"Q. About half and half?

"A. That is a guess, though."

We wish to refer the court to the testimony herein-above quoted under the claim of the Acme Cement Plaster Company, wherein the testimony of Sullivan shows that the materials furnished by all of these materialmen not only entered into the manufacture of blocks for the Lincoln High School, but also into the manufacture of blocks for the Smith Hotel and other contract jobs, and for the purpose of making a supply on hand in their yard. And under the rules of our Supreme Court, as announced above, relating to mechanics' liens, the claim just referred to is not a properly lienable item.

Continuing the testimony (transcript of record, page 114): Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I will call your attention to the name of the "Portland Quarry Company.

"A. We are owing them \$134.00 for hauling "away rubbish from the Lincoln High School.

"Q. Hauling rubbish away from the Lincoln High "School?

"A. Yes, sir.

"Q. In connection with your contract there?

"A. Yes, sir.

"Q. Has that been paid?

"A. No, sir."

We wish to submit to the court that the hauling away of rubbish is not a lienable item under the lien laws of the State of Oregon, and therefore is not a proper claim against the bond in the case at bar. The



exact language of the law, Section 7416, Lord's Oregon Laws, is: "Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, teamster, drayman, and other person performing labor upon or furnishing material, or transporting or hauling any material of any kind to be used in the construction, alteration," etc. As we have before stated, the mechanics' lien law must be strictly construed, and the exact language of the statute is, "for hauling material to be used in the construction of a building," and under this language we do not believe that one who hauls the refuse or rubbish away is one who is hauling material to be used in the construction of the building; and therefore the expense thereof is a non-lienable expense.

Continuing the testimony (transcript of record, page 114): Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I call your attention to the Columbia Contract Company.

"A. We are owing them \$114.08.

"Q. For what?

"A. For sand furnished to the Lincoln High School.

"Q. Has that been paid?

"A. No, sir."

The same comments made hereinbefore on the claim of the Acme Cement Plaster Company and the Atlas Mixed Mortar Company apply to the above item, as the sand, being one of the elements composing the partition blocks, did not all enter into the new Lincoln High School; and therefore this is a non-lienable item.

Continuing the testimony (transcript of record, page 114): Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I will call your attention to the claim of the "Columbia Hardware Company.

"A. We owe them \$30.22, as near as I was able "to figure it out on the Lincoln High School. We "bought hardware from different firms, and a part was "delivered to our place on the east side, but as near as I "could segregate it, we owe them \$30.22 on the High "School.

"Q. Do you happen to know the full amount you "owe the Columbia Hardware Company?

"A. We owe them in addition to the \$30.22—we "owe them \$72.33.

"Q. But that is not connected with these?

"A. No connection with the school.

"Q. Has that \$30.22 been paid?

"A. No, sir.

Cross examination by Mr. Hunt (transcript of record, page 123.)

"Q. And the Columbia Hardware Company?

"A. Why for various forms of hardware we "bought from them. Used tools of various kinds.

"Q. Tools?

"A. —Tools, and—oh, parts of machinery and "parts of boilers and such as that.

"Q. That was a part of your permanent equipment "and plant, was it not?

"A. Part of it was, yes.

"Q. Did any part of that enter into the construction "of the building?

"A. No, the tools were only used in carrying out "the work of construction, and the parts of the boilers

“were used in the boilers in the drying of material.

“Q. Who purchased from the Columbia Hardware Company?

“A. \* \* \* There was a foreman.

“Q. I mean was it the Sullivan Fireproof Partition Company that purchased from them?

“A. Yes, sir.”

We wish to submit to the court that clearly the above item of the Columbia Hardware Company could not properly be construed to be a lienable claim in any event, under the testimony of the witness, and we submit that this is the only testimony given in regard to it. The items of expense were incurred by the Sullivan Company for acquiring new equipment or repairing the old, and were a part of their permanent plant; and under the lien law of the state no lien can be filed therefor, and, we clearly believe, no claim can be asserted therefor against the bond given by Hicks, for the Columbia Hardware Company did not furnish labor or material for the job and the tools, etc., did not enter into the construction of the building.

Upon this point the Supreme Court of Oregon has held that no lien can be claimed against a building for the use of tools and appliances used in moving or raising it or for transporting them to and from the building, under a statute giving a lien for materials to be used in the repair of the building.

See *Allen v. Elwert*, 29 Ore. 428, 44 Pac. 824.

See also *Jones on Liens*, sec. 1337, which is as follows:

"The statute does not give a lien for machinery  
 "furnished for the manufacture of materials used in  
 "a building or other structure. Thus, if one con-  
 "tracts for building a bridge, and machinery for  
 "crushing stone to be used for the mason work, and  
 "also appliances to carry the manufactured stone to  
 "the place where it is to be used, be supplied to him,  
 "there can be no lien for such machinery or ap-  
 "pliances. 'When the law says the material-man  
 "shall have a lien for all materials furnished for, or  
 "used in and about, the construction of bridges, it  
 "means such materials as ordinarily enter into or are  
 "used in the construction of bridges, and which are  
 "fairly within the express or implied terms of the  
 "contract between the owner and contractor. It does  
 "not mean the machinery that may be used for the  
 "manufacture of the materials themselves. You  
 "might just as well say that the mill by which the  
 "lumber is sawed, or the tools used by the mechanic  
 "in building a house, are materials furnished in the  
 "construction of the house, as to say that the ma-  
 "chinery used in the manufacture of the artificial  
 "stone is to be considered as part of the materials  
 "used in the construction of the masonry work of  
 "the defendant's bridges. The machinery thus used  
 "is the plant of the contractor, and can in no sense  
 "be said to be materials furnished or used in build-  
 "ing the bridges.' "

Taking up the next item (transcript of record, page  
 115.) Witness, A. C. Sullivan. Questions by Mr.  
 Thomas.

"Q. I call your attention to the claim of the East  
 "Side Transfer Company.

"A. We owe them \$75.65.

"Q. What is that for?

"A. For hauling.

"Q. Hauling of what?

"A. Hauling blocks.

"Q. To the Lincoln High School Building?

"A. To the Lincoln High School Building.

"Q. Has that been paid?

"A. No, sir."

Counsel for plaintiff in error contends that this one item would be a lienable item under the general laws of the state, section 7416, if asserted as a defense and counterclaim against the action of this plaintiff, provided the same had been paid, which the evidence shows it had not.

Continuing the testimony (transcript of record, page 115). Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I will call your attention to the claim of E. Hippeley.

"A. That is still owing, \$32.35.

"Q. What was that for?

"A. That was for the rent of motors and some repair work, some wiring.

"Q. In the Lincoln High School Building.

"A. In the Lincoln High School, yes, sir, incidental to this contract.

"Q. Incidental to this contract. Has that been paid?

"A. No, sir."

Cross examination by Mr. Hunt (transcript of record, page 123) :



"Q. Now, you spoke of E. Hippeley, \$32.35, rent of a motor. What was that motor used for?

"A. It was used in driving the mixer; we had a big tub mixer with which we mixed up the materials used in making the blocks. This motor was used in driving the mixer.

"Q. You rented a motor from him?

"A. Yes, sir."

We cannot conceive how counsel for the defendant in error or the court can find that such a claim as Hippeley's can be a lienable claim or a claim against the surety bond. Hippeley rented a motor which was used to drive the machinery incidental to the manufacture of the material which was furnished by the sub-contractor to the Lincoln High School; also incidental to the manufacture of material which entered into the Smith Hotel building and other contracts; and to prepare a stock to be kept on hand. Can it be said that the motor was material supplied and used in the construction of the Lincoln High School? We submit that, under the law hereinbefore set forth, this is clearly a non-lienable item, and clearly an item not chargeable against the surety bond; hence the court committed error in allowing the same as a counterclaim against the cause of action asserted by the plaintiff.

Continuing the testimony (transcript of record, page 115). Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I call your attention to the claim of the Northwest Door Co.

"A. We are owing them \$51.05.

"Q. What was that for?

"A. For some wood parts for our machinery as used at the Lincoln High School.

"Q. What was that for? Just explain so we can understand.

"A. They were wood cores that are used in the operation of making these blocks. They usually last the lifetime of one job or so.

"Q. These blocks are hollow; is that the idea?

"A. They were hollow and these wood cores were used for making the hollow part; after these blocks are molded in a machine, they are taken out and the wood cores were knocked out.

"Q. Those are necessary things in the construction of these blocks?

"A. Yes, sir.

"Q. Has that been paid for?

"A. No, sir."

Cross examination by Mr. Hunt (transcript of record, page 124) :

"Q. The Northwest Door Company. You spoke of furnishing wood as a part of the machinery. I didn't understand what that was.

"A. They made us a number of wood cores that were used in forming the hollow part of these blocks. We would set these cores down in the machine, and fill the machine up with plaster; then when it hardened we drove these cores out and have the hollow part of the block in their place.

"Q. That was a part of the manufacture of the block, was it not?

"A. Yes, a part of the process of making the block."

Can it be said that wood cores which were used in the manufacture of blocks is the furnishing of material which entered into the construction of the new Lincoln High School? We submit that this is not so, and that under the general lien laws of the state of Oregon no lien can be had by the Northwest Door Company therefor. Neither under the terms of the contract between School District No. 1 and Hicks, nor the sub-contract between the Hicks Company and Sullivan, nor the terms of the surety bond, can this item be claimed as allowable. It was material furnished directly to the Sullivan Fireproof Partition Co. on its own credit, and was not the furnishing of material that is within the letter or the spirit of the lien law or of the contract at bar or the surety bond.

Continuing the testimony (transcript of record, page 116). Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I call your attention to the claim of the Oregon Transfer Company?

"A. We are owing them \$72.75.

"Q. What was that for?

"A. For hauling at the Lincoln High School.

"Q. Has that been paid?

"A. No, sir.

This is probably a proper lienable item which could be asserted as a counterclaim, if paid.

Continuing the testimony (transcript of record, page 116). Witness, A. C. Sullivan. Questions by Mr. Thomas,

"Q. I call your attention to the claim of the Portland Machinery Company.

"A. We are owing them \$47.85. That is for—I "think it was a fan and some dry kiln trucks used in the "operation of drying the blocks.

"Q. Has that been paid for?

"A. No, sir.

Cross examination by Mr. Hunt (transcript of record, page 124) :

"Q. The Portland Machinery Company, I believe "you said, was for dry kiln trucks.

"A. Dry kiln trucks, and I think for a fan, if I "remember right."

"Q. These trucks, just common trucks to put stuff "on to carry around?

"A. They call it a dry kiln truck; it is used as a "part of a car that goes into the dry kiln to carry blocks.

"Q. And the fan, what is that?

"A. I am not so certain whether their bill included "that fan, or whether or not we paid for it. We had a "fan and bought it from them. I can't recall whether "or not it was paid for.

"Q. Then if this bill of \$47.85 does not include "the fan, it is all for trucks?

"A. Yes, sir; I think that is all we bought from "them.

"Q. Where are those trucks now?

"A. They are over here in a basement where part "of this machinery is.

"Q. Part of your plant—part of your equipment, "are they?

"A. They are now, yes.

"Q. They were then?

"A. They were used as part of the equipment, yes."

Under the law of the State of Oregon previously set forth herein, we submit that the claim for the payment of these trucks is not a lienable item and is not such an item as the surety company or the Hicks Company would be obligated to pay, and that therefore it did not constitute a proper item of counterclaim against the cause of action of the plaintiff. It was part of the machinery, plant and equipment of the Sullivan Company, and was not material that was used in the construction of the Lincoln High School Building; and the court erred in considering and allowing this as a proper counterclaim on behalf of the defendant.

Continuing the testimony (transcript of record, page 117). Witness, A. C. Sullivan. Questions by Mr. Thomas.

“Q. I call your attention to the claim of the Portland Railway, Light & Power Company.

“A. We owe them \$26.80 for power, and \$26.10 for lights at the Lincoln High School.

“Q. Has that been paid?

“A. No. sir.”

Cross examination by Mr. Hunt (transcript of record, page 125):

“Q. Now, the Portland Light & Power Company has a bill of \$52.90 for light and power. What was that power furnished for?

“A. To drive the motor.

“Q. To drive the motor?

“A. Yes, sir.

“Q. What motor—the Hippoley motor?

“A. Yes, the one that runs the mixer. And also for driving a fan in the dry kiln.



"Q. And the light was what?

"A. Lights used around the place where we were working.

"Q. But this motor, or this power was to drive a motor used in the manufacture of the blocks, was it not?

"A. Yes, sir."

We again submit to the court that clearly the power bill and the light bill are not lienable items which could properly be chargeable against the Hicks Company and the surety bond, and, not being such, are not capable of being used as a counterclaim against the cause of action of the plaintiff; and that the reception, consideration and allowance thereof constituted an error by the trial court. It might as well be said that the Portland Railway, Light & Power Company would have a lien or claim for car fare against the surety bond for the furnishing of power and a street car to transport a laborer employed by Sullivan who was furnishing work to the new Lincoln High School. One is as logical as the other.

Continuing the testimony (transcrip of record, page 117). Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I call your attention to the claim of George  
"B. Rate.

"A. We owe them \$13.75 for some plaster hair.

"Q. Plaster hair?

"A. Yes, sir.

"Q. Was that used at the Lincoln High School?

"A. Yes, sir. I think it was; as near as I can tell  
"it was.

"Q. Has that been paid?

"A. No, sir."

The plaster hair testified to above occupies the same relation as do the claims of the Acme Cement Plaster Company and the Atlas Mixed Mortar Company; for the hair entered into the construction of the blocks which were used, not only in the Lincoln High School, but also in the Smith Hotel, in contract jobs, and to furnish a stock on hand for the Sullivan Company. We submit that the rule of law and the decisions heretofore announced and cited control.

Continuing the testimony (transcript of record, page 117). Witness, A. C. Sullivan. Questions by Mr. Thomas.

Q. I call your attention to the claim of the Union "Oil Company.

"A. We are owing them \$78.25.

"Q. What was that for?

"A. That is for coal oil furnished at the Lincoln "High School.

"Q. How was it used?

"A. It was used as a sort of lubricant in knocking "out these cores.

"Q. Has that been paid?

"A. No, sir."

We submit that the coal oil supplied by the claimant is not a lienable item and is not a charge that could be enforced against the Hicks Company or the surety bond; hence that the same was improperly allowed as an item of counterclaim in this suit.

Continuing the testimony (transcript of record, page 118). Witness, A. C. Sullivan. Questions by Mr. Thomas.

“Q. I call your attention to the claim of the Western Lime & Plaster Company.

“A. We owe them \$1285.91.

“Q. What was that for?

“A. For plaster.

“Q. Used at the Lincoln High School Building?

“A. Yes, sir.

“Q. Has that been paid for?

“A. No, sir.”

Under the testimony in this case hereinbefore cited, the plaster as supplied by this particular claimant, the Western Lime & Plaster Company, entered into the making of blocks not only for the new Lincoln High School, but also for the Smith Hotel job, other contract jobs, and for the furnishing of a stock on hand for the Sullivan Company, and was not a lienable item under the law of the state, and was not an item that could be successfully asserted against the Hicks Company or against the surety bond; hence it was an improper item of counterclaim.

Continuing the testimony (transcript of record, page 118). Witness, A. C. Sullivan. Questions by Mr. Thomas.

“Q. I call your attention to the claim of Wright & Branch.

“A. Wright & Branch—we owe them a balance of \$1400.00.

“Q. A balance of \$1400.00.

"A. Yes, sir.

"Q. For what?

"A. It is a balance due them on a sub-contract that "they took from us for erecting partitions.

"Q. In the Lincoln High School Building?

"A. In the Lincoln High School Building.

"Q. Has that been paid?

"A. No, sir.

We submit that the item just testified to is probably a lienable item under the mechanics' lien law of this state, but in the absence of the same being paid the trial court ought not to have considered it as a proper claim for damages. The Hicks Company contends that it was liable for this under its bond; but, as we have endeavored to urge upon this court, the bond was for indemnity against damage and not indemnity against liability; and there being no damage arising under this particular item, because of the non-payment thereof the same should not have been considered by the court.

Continuing the testimony (transcript of record, page 118). Witness, A. C. Sullivan. Questions by Mr. Thomas.

"Q. I call your attention to the claim of the United "States Steel Products Company.

"A. We owe a balance of \$150.00.

"Q. What was that for?

"A. That is for wiring—wire—reinforcing wire.

"Q. That is used in these blocks? A small wire?

"A. A small chicken wire.

"Q. Used as a reinforcement?

"A. Yes, sir.

“Q. That was used in these blocks used in the Lincoln High School?

“A. Yes, sir.

“Q. Has that been paid?

“A. No, sir.

The same comments heretofore made apply also to the above claim.

This comprises the testimony in reference to the claims of the various laborers and materialmen, and we hope that the court has been indulgent and patient in the setting forth of the same.

We believe that the trial court committed grievous error; and that, based on the rule of law and the citations of authorities hereinbefore announced and set forth, the allowance of such claims upon such evidence as has been here given was not only improper, but that the consideration of the same by the court constituted the basis of the trial court's judgment and was reversible error.

One of the grounds specified in assignment of error 5 for a motion for judgment on the pleadings and for a verdict and judgment on the pleadings and testimony as set forth in the first ground of said motion, is as follows:

“1. That the defense of estoppel as set forth  
“in the plaintiff's reply was clearly established and



“that the defendant, Lewis A. Hicks Company, “was bound by the written assignment of the Sullivan Fireproof Partition Co. to Ladd & Tilton Bank, and the acceptance thereof by the Lewis A. Hicks Company, dated the 18th day of December, 1911, and the written notification given by the said Lewis A. Hicks Company, based on the written assignment and acceptance, which said written notification was dated April 3, 1912, and that the facts and matters set forth in the pleadings by the defendant did not constitute a defense to the matter of estoppel pleaded by the plaintiff.”

It will be noted that the plaintiff in error, by its reply and in the further reply to the answer, beginning at page 22 of the transcript of record, alleges that the Sullivan Company, as sub-contractor, entered into a contract with the Hicks Company for the doing of certain work on the Lincoln High School. That in order to enable the Sullivan Company to perform its contract, it applied to Ladd & Tilton Bank for a loan, which Ladd & Tilton Bank refused to make unless security was given for the repayment thereof. Whereupon the Sullivan Company executed an assignment to Ladd & Tilton Bank of all moneys due or to become due under its contract with the Hicks Company, which assignment was duly filed with the Hicks Company and accepted by it, and upon the execution thereof and its acceptance by the Hicks Company, Ladd & Tilton Bank advanced to the Sullivan Company the sum of \$3500 (transcript of record, pages 75, 76 and 77). Thereafter, pursuant to said assignment, the Hicks Company paid all moneys which were earned by the Sullivan Company under its sub-

contract to Ladd & Tilton Bank; and Ladd & Tilton Bank, pursuant to agreement, endorsed the checks of the Hicks Company, without recourse, and turned the same over to the Sullivan Co. in order that it might have sufficient funds to carry on the work mentioned in its said sub-contract.

On or about the first day of April, 1912, Ladd & Tilton Bank made inquiries as to the repayment of its loan to the Sullivan Company; and upon the request of Ladd & Tilton Bank the Hicks Company furnished a statement to the Sullivan Company, dated April 3, 1912, which is as follows:

“April 3d, 1912.

Sullivan Fireproof Partition Co., City.,

Gentlemen: As your work has been completed on the Lincoln High School there will be due you on or about May 1st the balance of \$4300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,

Lewis A. Hicks Company,

FK:KT

By Fred A Katz.”

Upon receipt of this notification of April 3d, stating that the work of Sullivan under the sub-contract had been completed and that there was due on or about May first the balance of \$4300.00, and expressing the willingness of the Hicks Company to pay \$700 at the time of the execution of the notification, Ladd & Tilton Bank,

relying thereon and believing that the Sullivan Company had performed its contract according to its terms and believing that the balance was due it as set forth in the notification, released the \$700, leaving a net balance due under said contract of \$3600, the same being the amount of the indebtedness due Ladd & Tilton Bank from the Sullivan Company at that time.

Thereafter, and on or about May 1, 1912, when Ladd & Tilton Bank applied to the Hicks Company for the balance of the \$3600 the Hicks Company repudiated its action and agreement and refused to pay the money.

Plaintiff in error submits that the assignment of the funds by Sullivan Company to Ladd & Tilton Bank and the acceptance thereof by the Hicks Company, and the Hicks Company's letter of April 3, 1912, and the reliance placed thereon by Ladd & Tilton Bank, all to its subsequent injury, created an estoppel which would prevent the Hicks Company from asserting the defense made in its answer. We submit that where the course of action of one leads another to do a thing or perform an act which the other would not have done save in reliance on the statement of facts or things promised to be done, the one making the statement is estopped to set up a different existing state of facts, to the prejudice and harm of the one relying thereon. It will be noted from the evidence that the Ladd & Tilton Bank learned for the first time, about May 1, 1912, that the Sullivan Company had unpaid bills for labor and material in connection with its contract and that it had no such knowledge at the time of the execution of the notification by the Hicks Company dated April 3, 1912. On the con-

trary, the Hicks Company had direct knowledge long prior to the notification of April 3, 1912, wherein they make the definite statement of the payment of money to Ladd & Tilton Bank, that the Sullivan Company had unpaid bills for creditors and materialmen incurred on account of its sub-contract. See the testimony (transcript of record, page 98). Witness, A. C. Sullivan. Questions by Mr. Hunt.

“Q. You will please state whether or not you know “that the Lewis A. Hicks Company knew that you had “unpaid laborers and materialmen on account of the “work done by you under that sub-contract.

“A. Why, I don’t know whether or not they knew “of all the outstanding accounts we had, but I know “that they had received letters from some of them—several of our creditors telling them of the amounts that “were owing to them by us.

“Q. Those letters received from your creditors by the Lewis A. Hicks Company, and the notification of “the amounts due, did they constitute the sum of \$700.00 “which you spoke of just a few moments ago, or was it “in addition to the \$700?

“A. Well, the ones I have in mind are two outside “of the \$700.00. That \$700.00 was made up of several “invoices that I took down there and showed Mr. Katz “how I intended to disburse this \$700.00, and had a list “of the names and amounts.

“Q. Did you know what other accounts—you said “you had in mind two others who had filed claims beyond the \$700.00. Do you know who they were?

“A. Mr. Wagner of the Hicks Company had told “me that the Columbia Contract Company and the Atlas “Mixed Mortar Company had both written him, noti-



"fying him that we were back in our accounts with  
"them."

Transcript of record, page 132. Witness, A. C. Sullivan. Questions by Mr. Hunt.

"Q. Did the bank request that that notification  
"dated April 3, 1912, be addressed to itself, or did it  
"just simply say that a notification be given of a certain  
"amount due and when it would be paid?

"A. I think that was the way the request was made;  
"that a letter be written stating the amount due us, and  
"when it would be paid.

"Q. Did Mr. Katz of the Hicks Company know  
"that that letter was going to be delivered to Ladd &  
"Tilton Bank?

"A. Yes, sir.

"Q. And did he know that it was upon the strength  
"of that letter and the information therein contained that  
"Ladd & Tilton Bank was going to release \$700.00?

"A. Yes, sir.

"Q. How many of these claims that you have tes-  
"tified about did the Lewis A. Hicks Company, or any  
"of its agents, know at the time of April 3, 1912—that  
"you know they knew of?

"A. Well, at different times when I was in the  
"office, Mr. Wagner or Mr. Katz would speak to me  
"about having received letters from different people.  
"Now, I remember distinctly him telling me that he had  
"heard from the Columbia Contract Company and the  
"Acme Mixed Mortar Company and one day gave me  
"a letter or showed me a letter from Mr. Thomas of the  
"School Board calling attention to an account that had  
"been presented to them; it was one of the plaster ac-  
"counts, I don't remember whether the Western Lime  
"& Plaster or the Acme Cement Plaster.



"Q. One of the big plaster contracts?

"A. Yes, sir.

"Q. Did you ever generally inform the Hicks Company prior to April 3, 1912, that you were in financial difficulties?

"A. Oh, no. Mr. Wagner and I spoke of it. I think he knew fairly well what condition we were in about that time."

Transcript of record, page 140. Witness, Mr. Katz. Questions by Mr. Hunt.

"Q. You say it was not your intention to make any binding obligation on the Hicks Company by writing that letter (notification of April 3, 1912). That is what you said, isn't it?

"A. Yes.

"Q. But you did state that the contract had been completed, didn't you?

"A. Yes, sir.

"Q. You knew that it was completed?

"A. Yes, sir.

"Q. And you said that there was a balance due of \$4300.00, didn't you?

"A. Yes, sir.

"Q. And you said it would be paid on or about May 1st?

"A. Yes, sir.

"Q. You made no reservation about liens, as you call it, or any other labor claim, did you?

"A. No.

\* \* \* \*

"Q. Did you know, Mr. Kratz, that Sullivan had other unpaid creditors—other than those represented in this \$700?

"A. Yes, sir.

"Q. At the time of this notification of April 3d?

"A. Yes, sir.

"Q. Did you know that they had priority and would have to be paid?

"A. Did I know what?

"Q. That they had priority and would have to be paid?

"A. Prior orders?

"Q. Priority. Didn't you know that they were first in the law and would have to be paid before anybody else—these other claimants?

"A. That was my impression.

"Q. Yes, you knew they had to be paid, and if they were paid as they had to be paid under the law, you knew that there wouldn't be \$4300.00 due, didn't you?

"A. There was \$4300.00 due at that time."

Transcript of record, page 150. Mr. Katz. Questions by Mr. Hunt.

"Q. Did you understand at that time, Mr. Katz (referring to the notification of April 3, 1912), that Hicks was going to have to pay any of these claimants under Sullivan? You knew Hicks would have to pay his own bills, but did you know that Hicks was going to have to pay any bills of Sullivan's?

"A. Sure.

"Q. You did. At that time you thought that?

"A. Yes."

Transcript of testimony, page 159. Witness, A. C. Sullivan. Questions by Mr. Hunt.

"Q. Mr. Sullivan, I wish you would make it clear whether or not you ever told Mr. Howard, prior to the first day of April, that you had indebtedness accruing on account of unpaid labor and material claims on the Lincoln High School and your contract with Hicks.

“A. No, sir. I don’t think I ever spoke to Mr. Howard about it at that time—previous to that time.

“Mr. Thomas: What date was that—April 1st?

“Mr. Hunt. April 3d, the date of the notice.

“A. That is I don’t think I ever directly called his attention to it or explained to him what we owed.

“Q. Was it your intention Mr. Howard should so understand you had other indebtedness, or did you intend he should be kept ignorant of that fact?

“A. I didn’t particularly mean he should be kept ignorant of it, but I wasn’t anxious that he should know at that time just how we were involved. Just as I didn’t—I didn’t go to him and let him know that we were or to what extent, but I didn’t use any means of not letting him know.

\* \* \* \*

“Q. You mean you didn’t wilfully conceal, but you just simply didn’t tell him the facts which he didn’t ask about.

“A. Yes, sir.

We submit to the court that the testimony could not show a more reprehensible state of facts on the part of the Hicks Company than is disclosed herein. The Hicks Company knew that Ladd & Tilton Bank had loaned money to the Sullivan Company with which it was to perform its sub-contract with the Hicks Company. On or about April 1st, the Hicks Company knew that the Sullivan Company had incurred large bills for labor and material which it had not been able to pay and probably could not pay, and knew at that time that the creditors of Sullivan on account of his sub-contract were pressing him; and a portion of the creditors had even gone to the extent of writing letters to the Hicks Company explain-

ing the condition. Yet, with knowledge of all the facts, the Hicks Company testified that, having such knowledge, on April 3, it notified Ladd & Tilton Bank that the contract had been completed and that there was due Sullivan \$4300.00, which would be paid on May first, of which amount the Hicks Company was willing to pay \$700 on that date provided Ladd & Tilton Bank would release it to the Sullivan Company; and the Ladd & Tilton Bank, in good faith, acted upon this notice, and, facts being concealed from it, which would have changed its course and conduct, released the \$700 and awaited the final payment which the Hicks Company promised to make. We submit to this court that the Hicks Company wilfully and fraudulently made statements to Ladd & Tilton Bank which it knew to be untrue, and Ladd & Tilton Bank believed the same and, relying upon the truthfulness thereof, released said \$700, which, under the law, it could have applied upon its own indebtedness. And the Hicks Company having thus misled Ladd & Tilton Bank for its own secret profit and gain and to the loss of Ladd & Tilton Bank, later attempted to assert a statement of facts which, if true, would tend to defeat the right of Ladd & Tilton Bank for the balance of the contract price. We submit to the court that such conduct on the part of the Hicks Company is not only inexcusable, but that it discloses facts which show its intention to wilfully mislead and defraud Ladd & Tilton Bank; and that its success in such fraud and wilful misrepresentation ought not to be a defense by it to the action at bar.



From Federal Case No. 14099, 24 Federal Cases, we quote the following portion of an opinion rendered by the Circuit Court of the United States for the Northern District of Ohio:

“It is a principle of law of universal application (and as just as it is general) that admissions whether of law or of fact which have been acted upon by others are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. And the principle is founded upon grounds of public policy that a man shall not be permitted to repudiate his own representations. It was forcibly said by Justice Campbell in regard to the validity of this identical guaranty, that ‘a corporation quite as much as an individual is held to a careful adherence to truth in their dealings with mankind and cannot by their representations or silence involve others in onerous engagements and then defeat the calculations and claims their own conduct has superinduced.’”

In the case of *Kirk v. Hamilton*, 102 U. S. Sup. Ct. 68, Justice Harlan said:

“We are of the opinion that the present case comes within the reasons upon which rest the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts *in pais* or by oral declarations. ‘What I induce my neighbor to regard as true is the truth as between us, if he has been misled by my asseveration,’ became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent in *Wendell*



“v. Van Rensselaer, 1 Johns. (N. Y.) Ch. 344:  
 “‘There is no principle better established, in this  
 “court, nor one founded on more solid considera-  
 “tions of equity and public utility, than that which  
 “declares, that if one man, knowingly, though he  
 “does it passively, by looking on, suffers another to  
 “purchase and expend money on land, under an  
 “erroneous opinion of title, without making known  
 “his own claim, shall not afterwards be permitted  
 “to exercise his legal right against such person. It  
 “would be an act of fraud and injustice, and his  
 “conscience is bound by this equitable estoppel.’  
 “While this doctrine originated in courts of equity  
 “it has been applied in cases arising in courts of  
 “law.”

We would refer the court to the sound statement which has been affirmed and reaffirmed in the case of *Dickerson v. Colgrove*, 100 U. S. Reports, 578, where Justice Swayne said:

“The estoppel here relied upon is known as an  
 “equitable estoppel, or estoppel *in pais*. The law  
 “upon the subject is well settled. The vital prin-  
 “ciple is that he who by his language or conduct  
 “leads another to do what he would not otherwise  
 “have done, shall not subject such person to loss  
 “or injury by disappointing the expectations upon  
 “which he acted. Such a change of position is  
 “sternly forbidden. It involves fraud and false-  
 “hood, and the law abhors both. This remedy is  
 “always so applied as to promote the end of justice.  
 “It accomplishes that which ought to be done be-  
 “tween man and man and is not permitted to go  
 “beyond this limit.”

In the case of *Mizner v. Kussell*, 20 Mich. 229, the following language was used by Justice Campbell, Justices Cooley and Christiancy concurring:

“No one can evade the force of the impression  
 “which he knows another received from his words  
 “and conduct, and which he meant him to receive,  
 “by resorting to the literal meaning of his language  
 “alone. Every one is responsible for the belief he  
 “intentionally creates, whether by words or other-  
 “wise, and will be precluded from profiting by any  
 “unconscionable use of an obligation which has been  
 “thus wrongfully obtained.”

Without quoting further cases at length, we cite to the court the following:

*Conway National Bank v. Pease*, 82 Atl. (N. H.) 1068.

*Seymour v. Oelrichs*, 103 Pac. (Calif.) 88.

*Swain v. Seamens*, 9 Wallace (U. S.), 254, at p. 274.

*Jones v. Subera*, 126 N. W. 253.

*Jaques v. Esler*, 4 N. J. Eq. 461.

*Carruthers v. Whitney*, 105 Pac. (Wash.) 831.

Note “d,” 134 Am. St. Rep. p. 177, and some 30 or 40 cases cited thereunder, sustaining the same principle.

We submit to the court that under the evidence aforesaid and by virtue of the acts and deeds of the Hicks Company which were untruths and known to be untruths at the time made, and the application of the principles of law as above enunciated, the estoppel was clearly shown and the court erred in not so finding and

sustaining the motion for a verdict and judgment on the pleadings and evidence.

One other point remains to be briefly referred to under the assignments being discussed.

We wish to submit to the court the fact that the different parties who have furnished material to the Sullivan Company to be used in performing its contract with the Hicks Company are not such materialmen as are contemplated by Section 6266, Lord's Oregon Laws (conceding that it is controlling in the case, for the purpose of this argument only) or the general lien laws of the State of Oregon; and, further, that such materialmen did not furnish materials which were to be used in the construction of the new Lincoln High School so as to bring them within the purview of the law or of the surety bond.

It is to be noted from the contract and evidence that the Sullivan Fireproof Partition Co. agreed to sell and furnish to the Hicks Company certain fireproof partition tile, and that the manufacture of the fireproof partition tile by the Sullivan Company is under a secret process and formula and is a result of the combination of numerous materials. It is further shown that, in the manufacture of the fireproof partition tile, sand was essential, lime was essential, plaster was essential, hair was essential, wood cores were essential, coal oil was es-

sential, and probably chemicals. It was the combination of all these articles that produced a fireproof partition tile, which was the commodity that the Sullivan Company sold to the Hicks Company and agreed to place in the building. The combination of all the elements above mentioned, when manufactured under the secret process of the Sullivan Company, constituted an entirely new manufactured product. We submit to the court that the materials thus furnished to the Sullivan Company were not so furnished relying upon the fact that each element was to go into the new Lincoln High School, but were furnished upon the credit of the manufacturer, the Sullivan Fireproof Partition Co.

If the claims allowed by the court as a counterclaim in this case are upheld, then we submit that it is going to be most difficult to draw the distinguishing line between materialmen who have liens and those who have not; and if the ruling is sustained, it will mean that a man furnishing material to an independent manufacturer who manufactures a new product, which product is placed in a building, would have a right to lien the building therefor. We submit that this is entirely contrary to the lien law, not only of the State of Oregon, but elsewhere, and contrary to the letter and spirit of the surety bond executed by Hicks.

To illustrate our meaning, we will suppose that one had a contract to manufacture a new and useful lock for the new Lincoln High School building, of which that particular person was the originator and patentee, having the sole right to manufacture it; and that the locks require a certain amount of steel and a certain



amount of brass. The manufacturer goes to A and purchases steel, also to B and purchases brass, and combines the two with other materials under a secret formula into an article known as an improved lock. Can it be successfully contended that A, the seller of the steel, and B, the seller of the brass, would have the right to lien the Lincoln High School, if it were a lienable building, for the materials supplied to the manufacturer who made a new product therefrom, or the right to claim under a surety bond such as Hicks gave in this case? If not, then we submit to the court that the plaster-man, the sand-man and the hair-man can have no lien against the new Lincoln High School and cannot claim under Hicks' surety bond. If the rule adopted by the trial court is correct, we confess we do not see the end; for if X sells the steel to A, knowing that A is going to sell to the manufacturer of locks, and that the lock is going to enter into the construction of a particular building, then X would also have the right to follow his material for lien purposes.

In support of the rule for which we contend, we desire to refer the court to Jones on Liens, 2d Edition, section 1326, where it is said:

"Materials must be furnished with special reference to their use in a particular building in order to secure the protection of a mechanics' lien law. In an Ohio case *Storer, J.*, said: 'The contractor who agrees to paint a building may purchase the constituent parts of the materials he uses of different persons; one may have furnished the oil, the other the pigment, but when all are combined, there certainly ought not to be a lien in



“behalf of each vendor. The brick-maker may have  
 “been supplied with the clay from which he has  
 “manufactured his brick by one party, and another  
 “have furnished the fuel to burn the kiln, but it  
 “cannot be said a right exists for both to be en-  
 “forced under the statute. And so with the iron-  
 “monger; he may sell the raw material to the foun-  
 “der and the machinist, but when it is worked up,  
 “whether it is changed from pig-iron into the bloom,  
 “or from the bloom into the bar, or from the bar  
 “into the steam engine or the sugar-mill, the right  
 “to follow it through all these changes ought not  
 “to be permitted else no vendee would ever acquire  
 “title to the manufactured article.”

Also Jones on Liens, 2d Ed., section 1330:

“There can be no lien for materials furnished  
 “solely on the credit of the person ordering them,  
 “though they be afterwards used in the construction  
 “of the building upon which a lien is claimed.

“A lien for materials is so far from depending  
 “upon their use in a building that, if they are used  
 “in its construction without having been furnished  
 “for it, no lien upon it arises for such materials.

“It is a question for the jury whether materials  
 “were furnished on personal credit or on the credit  
 “of the building. Upon this question any relative  
 “evidence is admissible.”

Also, in support of the rule, see 59 Ga. 653.

We submit to the court, without further argument,  
 that materialmen furnishing material to an independent  
 manufacturer to be milled or manufactured by him into  
 a distinct and new article, and the new article itself sup-

plying the building, have no lien because thereof, and that the materialmen in the case at bar would have no lien for their materials under the lien law of the state or for action against the surety bond of Hicks.

### ASSIGNMENT OF ERROR VI.

The following finding of the court is assigned as error:

“Under the bond of Hicks & Company to the School District it and its surety became liable for the payment of labor and material furnished to sub-contractors and which were used in the construction of the building, and to an action in the name of the state for the use and benefit of the labor and material claimants (Sec. 6266 L. O. L. Hill v. American Surety Co. 200 U. S. 197; Smith v. Mosier, 169, Fed. 430). The order and assignment from the Sullivan Company to the plaintiff was subject and subordinate to the terms of the contract between it and the defendant and their respective rights and liabilities thereunder. The plaintiff, therefore, knew or was chargeable with knowledge at the time it accepted the order and assignment and made advances thereunder, that Hicks & Company was liable for the payment of claims for labor and material furnished the Sullivan Company in the performance of its contract.”

The court found that the surety bond given by Hicks Company, with the Pacific Coast Casualty Company as surety, was pursuant to section 6266 of L. O. L., and that the defendant Hicks and his surety became liable on the bond for the unpaid materialmen and la-

borers of the sub-contractor Sullivan. We have heretofore set forth in this brief that it is alleged in the answer of the defendant Hicks that the bond was executed pursuant to section 6266 of L. O. L., which allegation was denied by the plaintiff in its reply, thus making a clear issue, but that no evidence was offered or received to show that said bond was executed pursuant to section 6266 of L. O. L.; and therefore the finding of the court on the same is unsupported by any evidence at all, and such finding is error.

We refer to our former argument in support of this assignment.

### ASSIGNMENT OF ERROR VII.

This assignment of error relates to the finding of the court, which is as follows:

“The contention is made on behalf of the plaintiff (1) that Hicks & Company cannot assert as a defense to this action its liability for unpaid labor and material furnished the Sullivan Company until it has paid and discharged them. And (2) that its liability under its bond is for such claims only as could be made the basis of a mechanics’ lien if such lien could be filed against a public building.

“I am unable to concur in the first position and it is unnecessary to consider the other, for, without detailing the evidence, it clearly shows that the unpaid material and labor claims for which liens could have been filed amount in the aggregate to more than the sum now claimed by the plaintiff. The statute (Sec. 6266) in pursuance of which Hicks & Company’s bond was given provides that

“any person furnishing labor or supplying material  
 “for the construction of the building specified in  
 “the contract and bond, may, when payment for the  
 “same has not been made, have a right of action  
 “and is authorized to bring suit in the name of the  
 “state for his use and benefit against the contractor  
 “and surety and to prosecute the same to final judgment and execution. Hicks & Company and its  
 “surety were therefore personally liable for unpaid  
 “labor and material claims of the Sullivan Company. The fact that such claims are still unpaid  
 “would be a good defense to an action by the Sullivan Company to recover on its contract, and the  
 “plaintiff stands in the place and stead of the latter, it is a proper defense to this action.”

The argument relative to this assignment of error is heretofore more completely given in this brief.

We contend that the unpaid laborers and materialmen were not competent as a defense on the part of Hicks, owing to the fact that the contract between the sub-contractor, Sullivan, and Hicks, and the contract between Hicks and School District No. 1, together with the surety bond therefor, was a contract to indemnify against damage and not to indemnify against liability, and that therefore such unliquidated claims as were set up in this case were not properly received and the court committed error in considering the same. And further the court stated in its finding: “Without detailing the  
 “evidence, it clearly shows that the unpaid material and  
 “labor claims for which *liens could have been filed*  
 “amount in the aggregate to more than the sum now  
 “claimed by the plaintiff.” We have endeavored to



demonstrate to the court in this brief that a great proportion, if not all, of the claims of laborers and materialmen were such claims as could not be made *the subject of a mechanics' lien*, and therefore they were not properly offset or counterclaimed against the plaintiff's demand.

### ASSIGNMENT OF ERROR VIII.

Error is further assigned to the trial court in making the following finding:

"The principal contention of the plaintiff is that  
 "the defendant is estopped by its letter of April 3,  
 "1912, from now asserting that there is not due and  
 "owing from it to the Sullivan Company the  
 "amount stated therein less the \$700.00. Assuming  
 "but not deciding that the letter amounted to a dec-  
 "laration by Hicks & Company that the sum of  
 "\$4300.00 was then due and payable to the Sullivan  
 "Company and that such sum would be paid the  
 "plaintiff in any event, and not a mere declaration  
 "that there was such a balance unpaid on the con-  
 "tract with the Sullivan Company, and assuming  
 "further that the plaintiff so understood it and re-  
 "lied thereon, there is no room for an application of  
 "the doctrine of estoppel because the undisputed  
 "facts show that the plaintiff was not thereby misled  
 "to its injury. It was no doubt lulled into inaction  
 "and in reliance thereon took no steps at the time  
 "to enforce its claim against the Sullivan Company,  
 "but the undisputed evidence is that the Sullivan  
 "Company was in no worse position financially in  
 "May, when the defendant refused to make the pay-  
 "ment than it was when the letter was written. The  
 "theory of an estoppel *in pais* is that one who by



"his acts or conduct has misled another to believe  
 "a given state of fact to be true and to act thereon,  
 "shall not be permitted to assert the contrary to the  
 "injury of the person so acting. The important con-  
 "dition of the right to assert such estoppel is the  
 "fact in addition to all others that the party plead-  
 "ing it must show that the attempted repudiation  
 "will work him injury by causing him to suffer a  
 "loss of some substantial character or that he was  
 "thereby induced to alter his position for the worse  
 "in some material respect (16 Cyc, 744; Dickerson  
 "v. Colgrove, 100 U. S. 578). Plaintiff was in no  
 "way injured by its delay in proceeding against  
 "the Sullivan Company, but its remedy against that  
 "company was as full and complete in May, when  
 "the defendant refused payment, as it was when  
 "the letter of April 3rd was written. It was not in-  
 "jured on account of the \$700.00 payment because  
 "it was made to pay claims which could have been  
 "asserted against it by the defendant, and more-  
 "over, it could not rightfully have applied such pay-  
 "ment to its own account because it was made on  
 "the express understanding of all parties that it  
 "was to go to the discharge of labor and material  
 "claims."

This assignment of error relates to the defense of  
 estoppel raised by the plaintiff in error. This also has  
 been discussed at length in this brief, and we submit that  
 the pleadings and the evidence clearly demonstrate that  
 Hicks, with knowledge of the unpaid claims of Sullivan,  
 definitely stated to Ladd & Tilton Bank that \$4300 was  
 due and would be paid on May first, and that, acting in  
 reliance upon such statement, Ladd & Tilton Bank re-  
 leased \$700 and made no effort to collect the remainder

of its indebtedness until after the Sullivan Company became bankrupt. We submit to the court that the pleadings and evidence created an estoppel on the part of Hicks and that such ought to have been the finding of the court.

### ASSIGNMENT OF ERROR IX.

This assignment of error is as follows:

“That the United States District Court for the  
 “District of Oregon erred in rendering judgment  
 “that the plaintiff take nothing by its complaint  
 “and that the same be dismissed, and erred in ren-  
 “dering judgment against the plaintiff for costs,  
 “and erred in rendering judgment in favor of the  
 “defendant and against the plaintiff.”

We submit to the court that the argument in the foregoing brief clearly demonstrates the error of the trial court.

In conclusion, we desire to call the attention of the court to the importance of this case and the issues presented therein; for if a bank is unable to assist a contractor by loaning money to him and taking an assignment of the funds which he is to earn under that contract, then the business of construction is seriously handicapped and builders and contractors will be great losers thereby. Further, if the court finds that the surety bond in this case was given pursuant to section 6266 of L. O. L. (in which view at this time we do not concur), then such bonds are of greater efficacy and value than are the mechanics' lien laws of the state, a

difference which we do not believe was in the mind of the Legislature when the section was enacted.

Based upon the foregoing assignments of error and the arguments given thereunder, and the citation of authorities and the principles announced therein, we submit to the court that the United States District Court for the District of Oregon committed error and that the judgment thereof should be reversed.

Respectfully submitted.

WOOD, MONTAGUE & HUNT,  
Attorneys for Plaintiff in Error.

IN THE  
**United States Circuit Court of Appeals**  
NINTH CIRCUIT.

**LADD & TILTON BANK,**  
a Corporation,

Plaintiff in Error.

vs.

**LEWIS A. HICKS COMPANY,**  
a Corporation,

Defendant in Error.

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**Brief for Defendant in Error.**

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Upon Writ of Error to the United States District  
Court for the District of Oregon.

**CHAMBERLAIN, THOMAS & KRAEMER,**  
**LESTER W. HUMPHREYS,**  
Attorneys for Defendant in Error.

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**STATEMENT.**

This action is to recover \$3,600.00, the balance alleged to be due under a construction subcontract. Plaintiff sues as the assignee of the subcontractor. Defendant as contractor constructed the Lincoln High School in Portland, Oregon. Parts of the work were sublet by defendant to J. D. Sullivan, who assigned his subcontract to Sullivan Fireproof Partition Company, a corporation. This company in turn assigned the payments to accrue under the subcontract to Ladd & Tilton Bank, plaintiff herein. It is upon this assignment that this action is based. (Par. XI, Complaint. Trans. p. 6.)

In answer, defendant pleaded that plaintiff should not recover, because plaintiff's assignor had failed to comply with that clause of the contract which imposed upon it the obligation to pay promptly as they became due all sums incurred for any work or labor done, or materials furnished, upon the building in connection with the contract. (Par. VIII, Answer. Trans. p. 13.) Details of unpaid claims appear in the answer. The sums unpaid amounted to \$4,496.61.

Defendant also pleaded the execution by defendant of a bond, required by Section 6266, Lord's Oregon Laws, which made defendant directly liable for labor and material bills incurred in the construction of the High School, including those incurred by subcontractors.

Plaintiff attempts to support its action by alleging an estoppel, based upon the following letter:

Apr. 3, 1912.

Sullivan Fireproof Partition Co.,  
City.

Gentlemen:

As your work has been completed on the Lincoln High School, there will be due on or about May 1st the balance of \$4,300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

Of this amount we are willing to pay you now \$700 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

Very truly yours,

LEWIS A. HICKS COMPANY,

FK:KT

By Fred A. Katz.

Plaintiff alleged that it was misled by this letter, so that it took no steps to collect the Sullivan Company's indebtedness. Plaintiff alleges also that defendant is secured against loss on Sullivan's unpaid claims by a bond executed at the time the subcontract was entered into.

It will be seen that there are two elements in plaintiff's case: 1, the contract of assignment; 2, the estoppel.

There are two elements in the defense: 1, the unpaid claims; 2, the bond to the School District.

A trial was had before the Court, without a jury. Trial by jury was waived orally, there being no stipulation in writing waiving the jury. Judgment was given for defendant, and plaintiff appeals.

## POINTS AND AUTHORITIES.

### I.

Where a case is tried before the Court without a jury, and there is no written stipulation waiving a jury, none of the questions decided at the trial can be examined in an Appellate Court.

Erkel v. United States, 169 Fed. 623, and cases therein cited.

Cudahy Co. v. Bank, 69 Fed. 782.

Abraham v. Levy, 72 Fed. 124.

### II.

Sec. 649 R. S. (4 Fed. Stat. Ann. 393) and Sec. 700 R. S. (4 Fed. Stat. Ann. 450) apply to the present District Courts.

**36 St. L. 1167.** Judicial Code 1911, paragraph 291 (1 Supp. 1912 Fed. Stat. Ann. 249).

### III.

Federal Courts take judicial notice of the statutes of a State, without plea or proof thereof.

Lamar v. Micou, 114 U. S. 218, 223; 29 L. Ed. 94-95.

Mills v. Green, 159 U. S. 651, 657; 40 L. E. 293.

### IV.

One to whom the payments to accrue upon a contract are assigned, takes subject to all the terms and conditions of the contract.

Bryant et al v. Hagerty, 87 Pa. St. 256.

Hazeltine v. Dunbar, 62 Wis. 162; 22 N. W. 165.

Lawrence v. Phipps, 22 N. Y. Supp. 16.  
 Riffe v. Gerow, 29 W. Va. 462; 2 S. E. 104.  
 Somers v. Thayer, 115 Mass 163.

## V.

He who seeks to recover upon a contract must show that he has complied with the terms and conditions of the contract upon his part. It is a good defense to an action upon a contract to show that plaintiff has not discharged the obligations imposed upon him by the contract.

## VI.

Defendant was directly liable to Sullivan Company's laborers and material men under the bond given by defendant to the School District.

Section 6266 Lord's Oregon Laws.

Smith v. Mosier, 169 Fed. 431.

Hill v. American Surety Co., 200 U. S. 197;  
 50 L. Ed. 437.

Mankin v. United States, 215 U. S. 533; 54 L.  
 Ed. 315.

## VII.

Unpaid liabilities are proper items of proof in an action for damages.

The Heathdene, 155 Fed. 372.

8 A. & E. Encyc. Law (2 Ed.) 647.

## VIII.

A necessary element of an estoppel is injury to the person claiming the benefit of the estoppel. He must

show that his position was changed for the worse in some material respect.

16 Cyc. 744.

Dickerson v. Colgrove, 100 U. S. 578; 25 L. Ed. 618.

Maxwell v. Bay City Bridge Co., 46 Mich. 282.

Crandall v. Moston, 50 N. Y. Supp. 145.

Davis v. Bowmar, 55 Miss. 671.

## ARGUMENT.

At the threshold of this case stands the fact that there was no stipulation in writing waiving a jury. This fact prohibits the review of the matters assigned as error. Congress has fixed the manner of reviewing decisions of the Federal Courts. Among the things that are necessary in making a record to present to the Appellate Court is a stipulation in writing waiving a jury. (Sec. 649 R. S. 4 Fed. Stat. Ann. 393; Sec. 700 R. S. 4 Fed. Stat. Ann. 450.)

If the parties choose to waive a jury orally they may do so. But in that event they are concluded by the judgment of the Court on all matters submitted to it. As was said in *Kearney v. Case*, 79 U. S. 275; 20 L. Ed. 395-6, an oral waiver is "sufficient to support a judgment, but not sufficient to authorize a review of the rulings of the Court at the trial \* \* \*

The record \* \* \* presents a case where the parties consented to waive a jury, but did not take the steps necessary to secure the right to a review of the findings of the Court as provided by statute."



The case of *Erkel v. United States*, 169 Fed. 623, was decided in the Ninth Circuit by Judge Gilbert. We quote from the opinion as follows: "This case comes here upon writ of error to review a judgment rendered in an action of ejectment brought by the plaintiff in error against the defendant in error after a trial without a jury in the Court below; **there having been no written stipulation waiving a jury trial.** The assignments of error raise the question of the sufficiency of the evidence to sustain the findings on which the judgment was based."

After referring to Section 649 and 700 of the Revised Statutes, Judge Gilbert continues: "Under that statute it has been uniformly held that if a case is tried before the Court without a jury and there is no written stipulation waiving a jury, **none of the questions decided at the trial can be re-examined in an appellate Court on writs of error** (citing numerous authorities.)"

In the case of *Cudahy Co. v. Bank*, 69 Fed. 782, 783, it is said: "The first question to be considered is whether the errors assigned upon the record or any of them are subject to review by this Court. The decision of this question depends upon whether it affirmatively appears from the record that 'a stipulation in writing waiving a jury' was filed with the clerk, pursuant to the provisions of Section 649 of the Revised Statutes of the United States. It has been so often decided, both by this Court and by the Supreme Court, that an oral stipulation waiving a jury trial, in law cases tried in the Federal Courts,

is not sufficient to authorize an Appellate Court to review errors committed in the progress of the trial, that we need not stop to repeat what has so often been said on that point."

The case last cited is instructive also in connection with the case at bar, because it was there held that the recital in the bill of exceptions that the "cause came on for hearing and the jury having been empaneled and sworn and the introduction of evidence having been commenced, by stipulation of parties hereto duly entered, the jury was withdrawn, trial to jury waived" was not sufficient to show that there had been a waiver of jury by written stipulation. This ruling was based upon the fact that the local practice act (Iowa) permitted reference to be ordered on oral consent of the parties in open Court. It should be noted in this connection that the Practice Act of Oregon (Sec. 157 L. O. L.) permits a waiver of trial by jury by oral consent in open Court entered in the minutes. It follows that the recital in the bill of exceptions in the case at bar will not afford the basis of a presumption that the waiver of the jury was by written stipulation.

In the case of *Abraham v. Levy*, 72 Fed. 124, 128, it is said: "The second to ninth assignments of error inclusive and the 12th relate entirely to the **rulings of the Court on the trial as to the exclusion and admission of evidence, and on propositions of law arising on the merits.** As the record shows that the case was tried in the Court below before the judge, without the intervention of a jury, but does

not show any stipulation in writing to that effect, as required by Section 649 Rev. St. U. S., we have no authority to review the rulings covered by these assignments."

It follows from the consideration of the foregoing authorities that the record before this Court in the case at bar is not sufficient to confer jurisdiction to consider the matters assigned as error by plaintiff in the writ.

Any doubt whether the provisions of Section 649 R. S., which refers in terms to the Circuit Court, are applicable to the present District Courts must be dispelled by a consideration of Section 291 of the judicial code of 1911 (36 St. L. 1167; 1 Sup. 1912 Fed. Stat. Ann. 249), where this provision is made; "wherever in any law not embraced within this act, **any reference is made to** or any power or duty is conferred or imposed upon, **the Circuit Courts, such reference shall**, upon the taking effect of this act, **be deemed and held to refer to**, and to confer such power and impose such duty upon **the District Courts.**"

### **Was There Error by the Trial Court?**

In considering the matters urged by plaintiff as error it must be kept in mind that Ladd & Tilton Bank is the assignee of the Sullivan Company. Sullivan Company was bound by its contract to pay all claims of laborers and material men. It is a conceded fact in this case that the Sullivan Company failed to pay such claims aggregating about \$4,500.00. Defendant herein, the Hicks Company, because of

the bond entered into by it pursuant to Section 6266 L. O. L was originally and directly liable to these laborers and material men.

The plaintiff attempts to recover the sum of \$3,600.00. Plaintiff has the burden of proof to show that there is that sum due from defendant on the contract. *Marshall Bros. v. Clary*, 44 Ga. 511.

Ladd & Tilton Bank had notice of all the terms and conditions of the contract between the Hicks Company and the Sullivan Company. The bank was charged with this notice by the assignment which referred to, "all monies now due and that may become due **on that certain contract**, etc."

To the effect that Ladd & Tilton Bank was charged by the terms of its assignment with notice of all of the provisions of Sullivan Company's contract see the cases cited under Points and Authorities IV.

In the case of *Bryant et al v. Hagerty*, 87 Pa. 256, the assignment was very much like the assignment in the case at bar. It was in the form of a letter ordering Bryant and Euwer to "pay J. H. Hagerty all monies due or to become due for manufacturing lumber being sixty per cent of the lumber and all amounts due me for shingles \* \* \* delivered to you **under our contract**." The Court said, "Whether Hagerty knew of the terms of the contract or not he had notice of it and took acceptance subject to its terms."

The other cases cited on this point are to the same effect. Inasmuch as there has not heretofore in this



case been any dispute of this proposition of law, we will not here refer to them further, and in the following discussion will assume it to be demonstrated that Ladd & Tilton Bank stands in the shoes of the Sullivan Company, and (except as to the claim of estoppel) has no higher rights in this action than the Sullivan Company would have if it were plaintiff.

As we understand this case, there are two main questions, namely: First—Are the unpaid bills of the Sullivan Company sufficient to bar plaintiff's recovery? Second—Was defendant estopped?

Plaintiff contends that Sullivan Company's unpaid bills were not a good defense for the following reasons: Sullivan did not agree with Hicks Company to pay them; they are not such as would be the basis of mechanic's liens; Hicks Company is not liable for these claims on its bond; and Hicks Company had not, at the time of the trial, paid these claims.

We shall discuss these in the order stated.

The question touching Roebblings & Sons' garnishment is collateral, and its solution will follow the solution of the main question. Regarding the garnishment, we do not quarrel with the rule of law contended for by plaintiff in error under Points and Authorities I. But we submit that rule is not applicable to this case, because Hicks Company made no unconditional acceptance of the Sullivan Company's assignment to Ladd & Tilton Bank. The assignment was of moneys to become due on the con-



tract. By the terms of that contract, claims for labor and material incurred in doing work required by the contract, were to be paid before anything was due to the Sullivan Company. The claim of Roeblings on which their garnishment was issued was for material supplied to the Sullivan Company on the Lincoln High School job. The claim of Roeblings stood upon the same ground as all others of Sullivan's unpaid claims for labor and materials, distinguished from them in two particulars only, viz: that Roeblings brought suit, and that Hicks Company had paid this claim prior to the trial. If the trial Court was correct in its determination that the failure of Sullivan Company to pay its labor and material bills was a good defense to the action, then the Roeblings' claim is entitled to the same priority over Sullivan Company, and the plaintiff, that all others of Sullivan Company's unpaid bills are entitled to.

### **Did Sullivan Company Agree to Pay These Claims?**

This question, as we believe, finds its answer in the contract made by the Sullivan Company (Transcript, page 175), as follows: "The subcontractor agrees to save and keep the said building and premises free and clear of any and all mechanic's liens for work or labor done or materials furnished in the doing of the work specified herein. In this connection the subcontractor agrees to pay promptly as they become due all sums incurred for such work or labor done or materials furnished, and in case of any default on the part of the subcontractor,

the contractor shall have the right to pay said sums together with any additional sums, the payment of which is necessitated by said default of the subcontractor either for costs, attorneys' fees or otherwise, and all sums so paid by the contractor shall be repaid by the subcontractor, and the contractor may withhold any money due to subcontractor until such indebtedness is repaid."

Particular attention should be paid to the clause in paragraph 12 of this subcontract, this being the paragraph which relates to payments to the Sullivan Company (Transcript, page 177), and reads as follows: "Provided that at the option of the contractor **no payment shall become due** until the subcontractor shall have delivered to the contractor receipts showing, to the satisfaction of the contractor, **payment** by the subcontractor for **all labor done and material furnished under this contract** up to and inclusive of the amount of all previous payments made, and in case of the first payment, inclusive of its amount."

Counsel for plaintiff have an elaborately constructed argument to the effect that this contract is **merely one of indemnity against damage**, and not an agreement by Sullivan Company to pay its bills. In this argument counsel left out of consideration the Clause of the contract last above quoted. But including that as a part of the premise, it is difficult to escape the conclusion that the intention was that **whoever performed labor or supplied materials** to the subcontractor **should be paid by him before any**

**moneys should become due to the subcontractor.** It will be observed that the language of the contract requires payment "for all labor done and materials furnished under this contract." If such a clause as this does not amount to an agreement by the Sullivan Company to pay claims for labor and materials incurred by it in the execution of its work, we confess our inability to write a contract which would have that effect. It is scarcely possible with the English language to say in a more direct manner that Sullivan Company should pay all its laborers and material men.

We submit that the obligations of the Sullivan Company under this contract to pay the claims of its laborers and material men are clear and unambiguous. It is conceded in this case that Sullivan Company did not pay these claims to the extent of approximately \$4,500.00. The reason given by the Hicks Company for its refusal to pay, when demand for the \$3,600.00 remaining unpaid on the contract was made by Sullivan Company's assignee, was the fact that said claims for labor done and materials furnished under the contract had not been paid. (Transcript, page 84.) We submit this was a good defense.

### **Is It Necessary That the Items Should Have Been Lienable?**

Section 6266 L. O. L. was enacted in 1903. The purpose of the Act as revealed by the title is, "To protect subcontractors, material men and laborers,

furnishing material for doing work upon public buildings, structures, super-structures or other public works." Laws of Oregon, 1903, page 256. The statute itself requires a bond, "with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials for any prosecution of the work provided for in such contract." This has been held by the Federal Courts in the cases cited in both briefs to extend to laborers and material men dealing with subcontractors and to be designed with a manifest purpose that material and labor actually contributed to the construction of the public building should be paid for.

The bond given by Hicks Company in this case pursuant to the statute has this condition, "Now, therefore, if the said contractor shall well and faithfully perform all the covenants, conditions and provisions in said contract, plans and specifications, and shall pay all claims or liens for labor, work and material on account of all subcontractors, material men, laborers and mechanics furnishing labor or material under said contract and all claims for damages against the owner on account of personal injury to any persons working on or about said structure, then this obligation shall be void; otherwise to remain in full force and virtue."

The statute is complete within itself. It specifies the protection which shall be afforded, the persons designed to be protected, and sets forth the manner in which those persons may proceed in order to en-



joy that protection. We have seen no rule of law which authorizes or requires the Court to introduce, by judicial construction, into this statute, restrictions, conditions and qualifications which the Legislature did not put there. If it had been the purpose of the Legislature to provide no greater protection to laborers and material men working on public buildings than is conferred by the mechanic's lien statute as to private buildings, it would have been easy for the Legislature to say that the bond should be for the protection of those persons who could file mechanic's liens if the building were a private one. But the Legislature did not say that. It said the bond should require prompt payment "to all persons supplying him or them **labor or materials for any prosecution of the work** provided for in such contract."

The only argument of counsel for plaintiff in error is that this legislation had its origin in the fact that a public building was not lienable, and therefore, laborers and material men were without protection. But no authority has been cited holding that the Court should limit this protection so that it coincides with the protection afforded by mechanic's liens, when the Legislature itself failed to impose that restriction. We submit that under the statutes of Oregon the only question to be determined (it being conceded that the bills were unpaid) is, did the claimants supply the Sullivan Company labor or materials for any prosecution of the work provided for in its subcontract?



That is the language employed by the Legislature to express its intention, and there is nothing about the language itself which indicates any failure to make a full expression of the legislative intent. It is no argument against the act to say that if its language is construed to mean what it says, it gives greater security on public buildings than the mechanic's lien law affords on private buildings. If the Legislature wished to provide that larger security, it certainly was within the power of the Legislature to do so. There is no reason for presuming that the Legislature had any other intention than to require that every dollar of debt incurred for labor and materials on public buildings should be paid.

The Supreme Court of the United States has said (*Hill v. Surety Co.*, 200 U. S. 197; 50 L. Ed. 437): "We must not overlook the manifest purpose of the statute to require that **material and labor actually contributed** to the construction of the public building **shall be paid for, etc.**"

Now if the purpose of the statute was to require **payment** for labor and materials, why adopt the rules governing mechanic's liens, and so in some cases **prevent payment**, and defeat the very purpose of the statute?

Plaintiff in urging the adoption of the lien law, seeks to defeat the declared purpose of the statute. Plaintiff asks this construction to **prevent** the payment of these claims, not to insure their payment. It is not disputed that the materials were supplied at the High School; that they entered into its con-

struction, and are now a part of the building. Yet to prevent the payment of these claims, plaintiff would have the Court abort the statute by reading into it the restrictions with which mechanic's liens are hedged about.

We submit that the test to determine whether a claim is within the protection of the statute is this: Was the labor performed or material furnished for any prosecution of the work provided for in the contract? But assuming, for the purpose of argument, that this is not the test; assuming that the test is whether the claims asserted would be lienable under the mechanic's lien statutes, we submit that the defense is good, because among the claims which Sullivan Company left unpaid were enough which were lienable to extinguish the \$3,600.00 unpaid on the subcontract.

The two principal objections urged by counsel against the lienability of these items are: First, that the materials were sold to Sullivan Company, and were by it manufactured into blocks from which the partitions in the building were constructed, so that the materials lost their original character to such an extent as to be non-lienable items; second, that all the materials furnished did not enter into the Lincoln High School building, but part were used in other buildings.

The first of these objections must fail because it appears from the evidence that the materials were supplied for and delivered and used at the High School building. While it is true that at the build-

ing the materials were put through a process which resulted in blocks of a certain form, the plant at the High School was used only for the purpose of manufacturing blocks which went into the High School. The same argument which counsel urges, if followed to its logical conclusion, would mean that there could be no lien for any materials which went into a building in any other than their original shape. This argument could then be applied to prevent a lien attaching for lumber which had been fashioned by carpenters into window frames, doors, chests, cupboards, or other forms of interior finish. The sand and cement used to compose the mortar in which bricks are laid would be non-lienable; plaster, hair, etc., mixed into different form and applied to the walls; oils, lead and other ingredients which compose paint; sand, gravel and cement, which when mixed together, produce concrete for foundations or floors or sidewalks; all these would be non-lienable. This is not a case where materials were furnished to a factory and there manufactured, and afterwards sold as a finished product to a building. But the materials were delivered at the High School and were there mixed into their proper form and used in the construction of the High School. We submit that this contention of plaintiff is without merit.

The second point, that the materials were used in other buildings than the High School is not borne out by the evidence. The testimony shows that in the High School six-inch blocks were used exclusively. These blocks were moulded in a machine. The

machine was of such dimensions and design that three rows of six-inch blocks could be made at one time, leaving a row of three-inch blocks which were a necessary by-product; and so far as their use in the High School was concerned, they were necessary waste. The testimony was that 130,000 feet of six-inch blocks went into the Lincoln High School. Sullivan testified that about 10,000 feet of the three-inch blocks were taken from the Lincoln High School. Part of them were put into another building, and the remainder still remained in the possession of the Sullivan Company. Sullivan testified further, "I mean I have only included in there materials that I knew had gone into the High School; materials that were delivered to us by these different people to our place on the East Side I have not included in these amounts." (Transcript, page 129.) We submit that all the claims which were allowed as obligations arising under the High School contract were lienable with the possible exception of a motor, which amounted to \$32.35. The testimony was that the value of the materials necessary to make 10,000 feet of blocks would be about \$360.00. There was a margin of \$900.00 between the amount sued for and the amount of unpaid claims. Consequently if allowance were made for these things, the amount of unpaid claims for which liens could unquestionably have been filed, would considerably exceed \$3,600.00, and, therefore, plaintiff would not be entitled to recovery.



## Was Hicks Company Liable on Its Bond for the Unpaid Claims?

Counsel for plaintiff in error have contended that there is no evidence that the bond given by the Hicks Company was in obedience to the Oregon statute. We submit that there is ample evidence in the facts themselves. The facts before the Court are these: First, the statute requiring a bond with certain specified conditions in certain circumstances, of this the Court takes judicial knowledge; second, a bond containing those conditions executed under the circumstances specified in the statute. Section 6266 is the only statute in Oregon regarding bonds in connection with public buildings. The law requires a thing to be done. The record shows that the thing required by the law has been done. Is it reasonable then to say that the Court cannot find from those facts that the law was obeyed; that the act was done in obedience to the law? Is it necessary to prove that the law requires a particular act to be done, and that the particular act required by the law was done and in addition to that, let the actor come to the witness stand and say, "I have obeyed the law?" We submit this would be absurd. To the effect that the Federal Courts take judicial knowledge of the statutes of a State without plea or proof, see *Lamar v. Micon*, 114 U. S. 218, 223, 29 Law Ed., 94, 95. *Mills v. Green*, 159 U. S. 651, 657, 40, Law Ed. 293.

The extent of Hicks Company's liability, we believe, is fixed by the statute and the bond. As has been suggested by counsel for plaintiff, the Federal



statute and the Oregon statute are very much alike. In the case of *Smith v. Mosier*, 169, Fed. 430, at page 434, it is said: "If literally construed the obligation of the bond might be limited to secure only persons supplying labor or materials directly to the contractor for which he would be personally liable, but we must not overlook in construing this obligation the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end \* \* \*

The obligation is 'to make full payments to all persons supplying it with labor or materials in the prosecution of the work provided for in said contract.' This language read in the light of the statute looks to the protection of those who supply labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied. If the contractor sees fit to let the work to a subcontractor who employs labor and buys materials which are used to carry out and fulfill the engagement of the original contract to construct a public building he is thereby supplied with the materials and labor for the fulfillment of his engagement as effectually as he would have been had he directly hired the labor or bought the materials.

Assuming this to be the correct construction of the statute and of the scope of the obligation of the bond, which I must do, it is no defense that the contractors, Mosier & Summers, paid the sub-

contractor, Kurehloff. **They and their surety are bound to pay Smith who furnished the paints and oils that went into these buildings to Kurehloff, who was employed by Mosier & Summers as a subcontractor. This the bond bound them to do."**

What has heretofore been said on the application of the restrictions of the mechanic's lien laws to this bond should be considered here on the question of the extent of the obligation assumed by Hicks Company by virtue of its bond. The result must be a conviction that Hicks Company was directly liable to all these laborers and material men.

There remains the contention of plaintiff's counsel that the obligation is merely one of indemnity against damage, which seems more appropriately to belong under the next heading.

### **Is It Necessary That Hicks Company Should Have Paid These Claims In Order to Urge Them as a Defense?**

This question, we believe, will be answered by considerations already advanced. If Sullivan Company breached its contract when it failed to pay these claims; if, under Sullivan Company's contract, these moneys did not become due until Sullivan Company gave evidence that the bills had been paid, then the essential fact to make the defense was the failure of Sullivan Company to pay the bills and not that they had been paid by Hicks Company. Sullivan Company's delinquency was the vital fact which constituted a breach of the contract and prevented the money from becoming due. On either of these points we could but repeat what has already been said.

There is this additional consideration. By reason of all the circumstances in which the parties were proceeding, Hicks Company had a direct, original obligation to Sullivan Company's laborers and material men. The amount of that direct, original obligation was determined by the amount which Sullivan Company failed to pay. That direct original obligation grew out of the bond which Hicks Company gave in obedience to Section 6266 L. O. L. These laborers and material men could, and some indeed did, maintain actions against Hicks Company on the bond.

So that by the amount the Sullivan Company was delinquent in paying its bills in full, by that amount was the Hicks Company left directly, originally responsible to laborers and material men by an obligation required by law, which could not be escaped, and which is in no sense dependent upon the outcome of this litigation. And it is this direct original liability that distinguishes this case from the mechanic's lien cases cited by plaintiff in error, wherein it is held that the filing of the notice of a mechanic's lien is not a damage within the provisions of an undertaking against damage. It is the existence of Section 6266 L. O. L. which distinguishes this case from the case of *Smith v. Bowman*, 32 Utah 33, 88 Pac. 687, cited by plaintiff in error. Utah has no such statute as Section 6266 L. O. L.

There is a further distinction between this case and the Utah case in this, that the Utah case was an action between a material man and a surety on a

bond exacted without statutory authority, while the case at bar is an action between a subcontractor and a contractor wherein the subcontractor is attempting to recover the balance upon his contract, in spite of the fact that he has violated the contract by not paying labor and material bills incurred by him, and is insolvent and cannot pay them; and the contractor, in compliance with the statute, has made himself directly liable for those unpaid claims of the subcontractor.

The argument that the undertaking of the Sullivan Company to the Hicks Company, and of Hicks Company in turn to the School District, was to indemnify against damage, seems to us a much strained contention. Its refutation is found in the language of Section 6266 L. O. L. "That such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials **for any prosecution of the work** provided for in such contracts," and in the language of the bond given by Hicks Company to the School District that the Hicks Company "shall pay all claims or liens for labor, work and material on account of all subcontractors, material men, laborers and mechanics furnishing labor or material under said contract," and in the language of Sullivan Company's subcontract wherein he agreed that no payment should be due him until he should have paid "for all labor done and materials furnished under this contract."

If the purpose of the statute and the bond were to protect the School District, plaintiff's argument



might have some basis, but the purpose expressed by the statute, by the bond and by the subcontract is to protect the laborers and material men.

The title of the act of 1903 (Section 6266 L. O. L.) is “to **protect subcontractors, material men, and laborers, etc.**” This has nothing indicating protection for the owner, nor indemnity against damage. The material men and laborers are the beneficiaries.

The statute itself requires a bond (Section 6266 L. O. L.) that there shall be prompt payment “**to all persons supplying \* \* \* labor or materials, etc.**” Does this look to the protection of owners? Clearly the beneficiaries are material men and laborers.

The bond given by Hicks Company requires it to pay “all claims **or** liens for labor, work, and materials, etc.” This bond was given in compliance with the statute. Through all these provisions can clearly be traced the paramount idea that laborers and material men must be paid. This is the theme that dominates throughout. The idea of protection to the owner, or municipality, is suggested nowhere outside of plaintiff’s brief.

The purpose to protect laborers and material men is the keynote. It is sounded in the title to the act; it is repeated in the body of the statute; it is echoed in the bond given by the Hicks Company, and re-echoed in the subcontract, wherein Sullivan Company agreed that no payment should become due until all labor and material bills had been paid.

In this situation we submit plaintiff cannot admit unpaid material and labor bills amounting to



\$4,500.00, which Hicks Company was bound to pay, and at the same time demand that Hicks Company make a double payment to the extent of the balance of \$3,600.00.

But considering the obligation as an indemnity against damage, it is not necessary that the claims should have been paid in order that they may constitute an injury. As we have before indicated, Hicks Company assumed a direct original liability to all of the Sullivan Company's labor and material men; that liability was measured by the amount that the Sullivan Company left unpaid, and by as much as Sullivan Company left unpaid, by that sum did it injure the Hicks Company. It is a well settled principle of law in an action for damages for personal injuries, that it is not necessary that liabilities for medical expenses and the like shall have been paid in order that they may be proved and recovered. In 8 A. & E. Encyc. Law (2 Ed.) 647, it is said: "It is not necessary that such amounts should have been actually paid, provided the plaintiff has rendered himself liable to pay the same."

In *The Heathdene*, 155 Fed. 368, 371, action was brought to recover a balance of freight claimed to be due. Among other defenses, it was claimed that the defendant was liable for stevedores' wages, which, however, had not been paid. The Court said: "The question of the stevedores' bill has, I think, been correctly decided, and needs no more discussion than has been given to it by the commissioner. He said, 'The testimony is positive that the item is to be paid

irrespective of the result of this litigation. Under these circumstances there is no reason, in my judgment, why it should not be allowed.' "

Plaintiff's counsel object to the matter of pleading the unpaid claims in defendant's answer, saying that they are contingent and uncertain, and that they should have been reduced to definite and fixed amounts. We contend that it is not necessary to plead these items with the particularity which would be required to support a claim of mechanic's lien. In our view it was only necessary that the answer should show facts constituting a breach of the contract by the Sullivan Co., and for this purpose the answer is sufficient. It will be seen, however, by an inspection of paragraph XIII of the answer (Transcript, page 16) that the name and amount due each of the claimants for labor and materials, was set forth. We are not able to conceive how a claim could be made any more definite, or the amount any more fixed than was done in defendant's answer when it was stated, for example, that the Acme Cement Plaster Co.'s claim was \$836.55, and so on throughout the list. We are confident that the answer contained ample facts to constitute a defense to this action.

### **CONCERNING ESTOPPEL.**

It is attempted by plaintiff to base an estoppel upon a letter written April 3, 1912, by the Hicks Company to Sullivan Company as follows:

“April 3, 1912.

“Sullivan Fireproof Partition Company,  
“City.

“Gentlemen:

“As your work has been completed on the Lincoln High School there will be due you on or about May 1st the balance of \$4,300.00. According to your assignment this will have to be paid to the Ladd & Tilton Bank.

“Of this amount we are willing to pay you now \$700.00 to be applied on accounts on the job, to be paid through Ladd & Tilton Bank.

“Very truly yours,

“LEWIS A. HICKS COMPANY,”

“By Fred A. Katz.”

This letter reached the hands of Ladd & Tilton Bank. The bank claims that it was lulled to a false sense of security by this letter and took no action to collect against the Sullivan Company. The bank did not pay any money on account of this letter. Now, the bank had previously taken the assignment referred to in this letter, of moneys payable under the contract, whereby the bank was put upon notice of the provisions of the contract to the effect that Sullivan Company was bound to pay its laborers and material men, and that nothing would be due until those laborers and material men were paid. Having this knowledge, the bank was bound to inquire whether those claims had been paid.

In fact, the statement in the letter that the \$700.00 was to be applied on accounts on the job, was in itself notice that there were unpaid accounts of the

Sullivan Company, and the bank, having knowledge as it did of the terms of the Sullivan Company's contract, cannot now be heard to say that its suspicions as to unpaid accounts were quieted by the statements in the letter of the Hicks Company. Moreover, the letter merely says that the work had been completed. It did not say the contract had been complied with. We submit that the letter itself was not available to one having the knowledge that the bank had, as the foundation of an estoppel.

But if the letter would otherwise be sufficient upon which to base an estoppel, plaintiff's claim of estoppel must fail because it is not shown that it was misled to its injury, and that is an essential condition to an estoppel. It is said in 16 Cyc. 811, "the burden of the proof is on the party alleging and relying on the estoppel to establish all the facts necessary to constitute it."

In 16 Cyc., page 744, it is said: "In order to create an estoppel in pais the party pleading it must have been **misled to his injury**, that is, he must have **suffered a loss of a substantial character** or have been induced to **alter his position for the worse in some material respect.**"

The evidence submitted by plaintiff does not contain a syllable to show that the bank was injured in any manner, nor that it altered its position in any manner, nor that it could have improved its position in any manner had the letter not been written. A mere possibility is not enough, there must be a showing of some real injury. It will not suffice for the

bank officials to say they **might** have done something. They must show with reasonable probability that they **could** have done something. In *Maxwell v. Bay City Bridge Co.*, 46 Mich. 282, referring to the doctrine of estoppel, the Court said:

“As the doctrine, when applied, operates to take away legal rights, it is no more than common justice that the facts which are supposed to call for its application shall be unquestionable, **and the wrong which is to be prevented, be undoubted.**”

The plaintiff had the burden of proof to establish these things, but has failed to do it.

Not only was plaintiff's case without proof on this necessary point, but the evidence offered by defendant and not contradicted, shows affirmatively that the Sullivan Company's financial situation was exactly the same on the date of the letter, April 3, 1912, that it was at the time Hicks & Company denied there was anything due Sullivan Company. This testimony came from Sullivan himself. He testified, and his testimony was not disputed, that on April 3, 1912, his Company was insolvent and wholly unable to pay its debts, and that it would have been unable at that time to respond to any claim of Ladd & Tilton Bank or of any other creditor.

Counsel for plaintiff in error assert that the opinion of the trial Court on this point (their brief, pages 95 and 96) was erroneous. This is the eighth assignment of error. We submit that the opinion of the trial Court here set forth is a correct exposition of



the law as applied to the facts in this case, and that plaintiff's claim of estoppel must fail.

We believe the law to be as contended for by plaintiff in error as stated in its brief (page 10, Points and Authorities VI), as follows: "He who by his language or conduct leads another to do what he would not otherwise have done, cannot subject such person **to loss or injury by** disappointing the expectations upon which he acted."

We differ from plaintiff's counsel only in this, that we contend that plaintiff has not brought itself within the operation of this rule of law, because it has failed to show any loss or injury, and because the defendant has shown affirmatively that there was no loss or injury.

Plaintiff's counsel assert that Hicks Company misled the bank for its own secret profit and gain. There is no evidence of this outside of plaintiff's brief, and it is not true. Hicks Company has not profited in any way by this transaction. In fact, it is loser. Hicks Company's only concern is that these claims be paid, in order that it be not compelled to pay twice by reason of the Sullivan Company's delinquency.

We believe we have demonstrated three propositions, viz:

1. The absence of a stipulation in writing waiving a jury precludes the examination of the errors assigned in this case.
2. The existence of Sullivan Company's unpaid

labor and material bills to an amount in excess of the balance due under the subcontract is a good defense to this action.

3. Defendant is not estopped to assert this defense.

For these reasons the judgment should be affirmed.

Respectfully submitted,

CHAMBERLAIN, THOMAS & KRAEMER,  
LESTER W. HUMPHREYS,

Attorneys for Defendant in Error.

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No. \_\_\_\_\_

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IN  
**The United States Circuit  
Court of Appeals**  
for the Ninth Circuit.

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LADD & TILTON BANK, a corporation,  
*Plaintiff in error,*

vs.

LEWIS A. HICKS COMPANY, a corporation,  
*Defendant in error.*

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*Upon writ of error to the United States District  
Court for the District of Oregon.*

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**Reply Brief of Plaintiff in Error**

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FILED BY LEAVE OF COURT.

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Counsel for the defendant in error has argued to this court that inasmuch as a jury was waived in the trial court without the formality of a written stipulation, that this appellate court is precluded from considering the merits of the appeal upon the

errors appearing in the bill of exceptions which contains the transcript of the entire testimony and the rulings of the trial court, and that this court is limited to the inquiry: had the trial court jurisdiction, and is the judgment supported by the pleadings?

Counsel for the plaintiff in error believes that a question is here presented which has not often been adjudicated in the courts so far as our examination has extended, and we desire to submit to the court one of two conclusions, i. e., first, that there is a valid judgment rendered by the district court which is and ought to be reviewable in this court for errors occurring during the trial, and second, that there is no valid binding judgment of the district court and that the case stands on the trial docket of the district court awaiting trial in the manner provided by the statutes authorizing and governing trials in district courts. We will at this time address ourselves to the first question.

In the desire for an early trial, counsel for both parties stood before the bar of the trial court and each orally stated to the judge that a trial by jury would be waived. Written note thereof was made in the judge's docket, also written note thereof was made in the clerk's docket, and the case was set for trial upon a day certain. It was intended and understood that the case was to be submitted to the court upon the evidence and the law, with each party reserving unto itself the right of appeal to correct any errors occurring therein. With that understanding

the case proceeded to trial, and thereafter the court rendered judgment in favor of the defendant.

We submit to this court if there is any greater or less efficacy given to the judgment of the trial court and the right of review thereof owing to the fact that the parties submitted the issues governing their respective rights to the trial court without a jury, and further owing to the fact that the parties did not reduce a solemn and binding declaration, delivered orally, to two lines of written matter over their respective signatures. We apprehend that courts are created for the administration of justice, and the modern trend and tendency is to administer that justice without the fine-spun distinctions and technicalities that permeated the common law. If the trial court was empowered to render a judgment which would be conclusive and binding upon the parties, then we submit that the scheme of judicial procedure is defeated when the appellate court states that it will not review such judgment for errors occurring therein. The very purpose of the appellate court as a court for correction of errors is defeated owing to the fact that an oral stipulation of the parties waiving a jury, made before the bar of the trial court, intending to reserve to each the right of appeal, is not as efficacious as a written stipulation.

An examination of the authorities cited by the counsel for the respondent in error discloses the fact that the only reason upon which the appellate court bases its denial of the appellate jurisdiction is that



the federal statute states that a trial can be had only before a jury or where a written stipulation by the parties is made in writing. We submit that if the appellate court is precluded from reviewing the alleged errors occurring during the course of the trial, owing to the fact of the enactment of the various federal statutes, then the rule logically carried forward is that there being nothing to review there is nothing in the form of a final judgment.

We are impressed that we are now dealing with a technicality which would have delighted the judges of the English common law, and upon which pages and volumes would have been written in the effort to make the distinction between technicalities obvious to some one other than the writer of the opinion. Modern courts, however, wherein the law is administered by modern judges, recognize that the need of courts is for the judicial decision upon the merits between the rights of the respective litigants before it, and earnestly desire to and do justice between them based upon the facts and the law, irrespective of the dotting of an I or the crossing of a T.

We submit to this court: is there anything missing from the transcript of record in this cause which is vital to the interests of the respective parties, which would otherwise be in the record if a jury had been waived in writing? We believe the record herein is as full and complete as it could possibly be, and every fact is before this court to enable it to serve the purpose of its creation, the administration of justice. We contend that the plaintiff intended and be-

lieved it was submitting its cause to the trial court with the thought in mind that if error occurred it could have the same reviewed. The same thought and conclusion was in the mind of the defendant. It was not intended to be a final judgment such as could not be reviewed, and we cannot make the distinction between standing before the bar of the court and waiving a jury and filing a written stipulation to the same effect with the clerk. The purpose of the law has been served in either case, the court has been informed that it is not necessary to call a jury for the trial of a case. Counsel for either party was not misled, neither was the court. The intent of the law, as interpreted by the Supreme Court, is to inform the trial court whether or not it will be obligated to call a jury, and if the court is thus informed, either orally or in writing, we believe the purpose of the law is served and nothing more can be asked. To support our statement that the purpose of waiving a jury in writing is only for the information of the court to obviate the expense of summoning a jury we refer to the case of *Kearney v. Case*, 12 Wall. (U. S.) 275 at 283.

We earnestly believe that the appeal prosecuted in this case is meritorious and that grievous errors occurred during the trial, and we have asked this court to investigate the alleged errors and announce its conclusion thereon. If it does, then the purpose of the court is fulfilled and justice is served. If it does not, then justice is defeated, and when we ask

ourselves why we must answer that we have done all that the law required by informing the court of our desires, by agreeing with counsel as to our mutual desires, but confess that we did not sign a written stipulation waiving a jury, and when we further ask ourselves why the failure to file a written stipulation waiving a jury is thus so momentous in the administration of justice we are lost for the proper answer. We submit to this court, with all due respect and deference, that we are impressed that such a rule is without foundation and cannot exist in justice or good conscience. As we have said, we believe this appeal to be of merit, and all that we ask is that the appellate court shall perform its functions in the administration of the law and pass upon the errors assigned. If we are wrong in our assumption of error we desire to know it through the instrumentality of this court and have the same judicially stated. If we are right in our assumption of error and the case will not be reviewed, then the administration of justice is aborted and the plaintiff is told to go forth and submit to the infliction of a wrong which is known to be a wrong, and be forever without remedy. If we could find or have suggested any satisfying reason why such a rule regarding the written stipulation should be so strictly and, probably at times, unjustly enforced, then with good grace we would submit to the penalty which is being urged to be inflicted by the respondent in error. If there is a valid judgment in the trial court we ask that that judg-

ment be reviewed for errors assigned. We believe that the law did not intend to create such a condition that a litigant would be bound by a judgment in a *nisi prius* court from which no appeal would lie.

As to the second question we desire to enter into a brief discussion of whether or not there is a judgment in the lower court.

United States Compiled Statutes, section 566, in reference to trials in the district courts, provides as follows:

“The trial of issues of fact in the district courts, **in all causes** except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, **shall be by jury**. In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different states and territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it.”

By this section it will be observed that the district courts, prior to the enactment of the judicial code, could only render a valid judgment in the event a cause was tried before it with a jury, except in cases in equity, admiralty and proceedings in bankruptcy.



Section 648 of the United States Compiled Statutes refers to trials in the circuit courts prior to the enactment of the judicial code, and is as follows:

**“The trial of issues of fact in the circuit courts shall be by jury,** except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy and by the next section.”

We note that all cases must be tried by a jury in the circuit courts except cases in equity and admiralty jurisdiction and proceedings in bankruptcy.

Section 649 of the United States Compiled Statutes is as follows:

“Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of the jury.”

And here we note that civil cases may be tried without a jury when a stipulation is filed with the clerk, in writing, waiving the same.

Section 700 of the United States Compiled Statutes is as follows:

“When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the



rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

And here we note how the rulings of the *nisi prius* court must be presented to the appellate court.

In 1912 the judicial code enacted by Congress went into effect, whereby the circuit courts of the United States were abolished and their jurisdiction conferred upon the district courts. None of the sections referred to, to-wit, section 566, in reference to the district courts, nor sections 648, 649 and 700, in reference to the circuit courts, were repealed. Section 291 of the judicial code provides, however, that where any power or duty is conferred or imposed upon the circuit courts, such reference, upon the taking effect of this act, shall be deemed and held to refer to and confer such power and impose such duty upon the district courts. We believe, therefore, from the examination of the law made subsequent to the oral argument in this court, that sections 648, 649 and 700 of the United States Compiled Statutes now relate to and govern the district courts. However, this is a question which has not been adjudicated, and the expression of this court, ruling thereupon, would be of great benefit and service to all practitioners before the United States courts.

We will therefore assume, for the purpose of this argument, that sections 648, 649 and 700 relate to and govern the district courts. Conceding this as true, in the absence of judicial expression thereupon, we desire to submit that the United States courts, being statutory courts, are bound to and limited by the restrictions and limitations embraced within the acts creating them, and that a valid judgment can only be rendered in such courts when rendered in strict conformity to the law of their creation.

Construing section 648 we find that judgment can be rendered in the United States district courts only after a trial by a jury, excepting certain cases of which this is not one, or can only be rendered by the said courts when a jury is waived by stipulation of the parties in writing. If anything is therefore absent in the jurisdiction of the court then the court is not empowered to render a judgment, and any judgment rendered by it would be *ultra vires* or would be a judgment not binding on any of the parties. We recognize and confess that the argument being here made is inconsistent with the argument being made under the first question herein discussed, but if we are wrong in our conclusion as urged in the first question, then we must be right in the one urged here, for otherwise the law so construed would be inconsistent, and if the jurisdiction of the appellate court is technically construed then likewise must that jurisdiction be technically construed in the trial court. We are impressed that we cannot be wrong in both cases and counsel for defendant in error be

right in both cases, for the inconsistency is as apparent in one as it is in the other. Our contention that there is an absence of a judicial or binding judgment in the trial court is supported by nearly all, if not all, of the authorities speaking upon this point when it is said that the submission to a trial court of a cause without a jury and without a written stipulation waiving the same is the submission to an arbitrator and is the submission of a cause in a manner unknown to such statutory courts. If it is the submission to an arbitrator and neither of the parties intend to be bound thereby, then the decision of such arbitrator is not a final decision, and we desire to add that neither party intended to be bound by the judgment of the trial court until the appellate court has passed upon the errors alleged to have occurred during the trial, if either party desired to have the same reviewed.

We wish to quote from one of the earliest cases, from one of the latest and from one decided by Judge Gilbert of the Ninth Circuit upon this point.

In the case of *Campbell v. Boyreau*, 21 Howard (U. S.) 223, decided in 1858, Mr. Chief Justice Tanney said:

“The finding of issues of fact by the court upon the evidence is altogether unknown to a common law court, **and cannot be recognized as a judicial act.** Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, **he does not exercise judicial au-**

thority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below nor examine the questions of law as if those facts had been conclusively determined by a jury or settled by the admission of the parties. \* \* \* **And as this court cannot regard the facts found by the judge as having been judicially determined in the court below,** there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. \* \* \* **Upon the grounds above stated the judgment in this case must be affirmed, but it must at the same time be understood that this court express no opinion as to the facts or the law as decided by the Circuit Court, and that the whole case is open to re-examination and revision here if the question of the facts and the law should hereafter be brought legally before us, and in a shape which would enable this court to exercise its appellate jurisdiction."**

Can there be any doubt as to what the Supreme Court meant in the capitalized portion of the opinion last above quoted? If the judgment of the trial court was final and binding then how could the whole case, either as to the facts or the law, be again re-examined by the Supreme Court if the same should thereafter be brought before it so it could exercise its appellate jurisdiction. If the judgment of the lower



court became *res adjudicata* then the Supreme Court has made a comment wholly irrelevant. Our conclusion from said quoted portion is that, that court desired it to be understood that the case could be re-tried and the facts and the law therein could later be re-examined in the appellate court when sufficiently presented to it. We submit that the said portion of the opinion is open to no other construction. Therefore, as indicated by the Supreme Court, if there is an absence of a written stipulation waiving the jury which precludes the jurisdiction of the appellate court, then equally and technically is the same construction true that there was no judgment in the lower court which would preclude a retrial of the cause therein.

In the last expression of the Supreme Court upon this point, in the case of *Campbell v. United States*, 32 Supreme Ct. Rep. 398, 224 U. S. 99, decided March, 1912, the Supreme Court, speaking through Mr. Justice Van Devanter, commented upon sections 566, 648, 649 and 700 of the Revised Statutes hereinbefore referred to and then stated:

**“In this state of the statute law the trial to the District Court without a jury was in the nature of the submission to an arbitrator—a mode of trial not contemplated by law, and the court’s determination of the issues of fact and of the questions of law supposed to arise upon its special finding was not a judicial determination, and therefore was not subject to re-examination in an appellate court.”**



If it was not a judicial determination we are at a loss to understand its nature other than the mere expression of an opinion of one not authorized to speak or render a valid and enforceable judgment between litigants.

We now desire to cite a case decided by the Circuit Court of Appeals for the Ninth Circuit, in which the opinion was written by Judge Gilbert, to-wit, the case of *Erkel v. United States*, 169 Fed. 623, decided in 1909, where it is said:

“It is well settled that no question of law can be reviewed on error except those arising upon the process, pleadings or judgment, ‘unless the facts are found by a jury by a general or special verdict or are admitted by the parties upon a case stated.’ *Campbell v. Boyreau*, 21 Howard 223, 16 L. Ed. 96. In that case it was held that the finding of issues of fact by the court upon the evidence is altogether unknown to a common law court **and cannot be recognized as a judicial act.** The court said: ‘And this court therefore cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties.’”

Again do we squarely face the language of the court where it says that the facts found below were not judicially determined. If not judicially determined then there is not a judicial judgment, and if not a judicial judgment then the case has not be-

come *res adjudicata*, and we submit that we are entitled to a new trial in the technical manner and method provided by the statutes creating the United States courts. Without further quotations of authority we desire to make the following citations bearing out the rule of law here announced:

United States v. Louisville & N. R. Co., 167 Fed. 306.

Low v. United States, 169 Fed. 88.

Town of Andes v. Slauson, 9 Sup. Ct. Rep. 573.

Supervisors v. Kennicott, 103 U. S. 554, 556.

Flanders v. Tweed, 9 Wallace (U. S.) 425.

Burr v. Railroad Company, 1 Wallace (U. S.) 99.

Graham v. Bayne, 18 Howard (U. S.) 60.

Also the citations of authority in the opinions above referred to.

In our search of the law which we believe to be pertinent upon the questions here presented to the court we found several cases where the Supreme Court of the United States expressly held that under such facts as are presented in the case at bar there was a mistrial, and the same was remanded to the trial court for a new trial in the manner provided by law.

In the case of Flanders v. Tweed, 9 Wallace 425, this decision was made. Mr. Justice Nelson, speaking for the court, said:

“A copy of the stipulation of the parties or attorneys filed with the clerk, waiving the jury,

should come up with the transcript in the return to the writ of error, so that the court could see that the act had been complied with. There having been no stipulation nor any findings of the facts in this case, and no question upon the pleadings, it would follow, according to the general course of proceeding in like cases heretofore in this court, that the judgment below should be affirmed. There are, however, cases which, under very special circumstances, the court have made an exception and have simply dismissed the writ of error, as in the case of *Burr v. The Des Moines Company*, 1 Wallace 99, or have reversed the judgment below for a mistrial and remand it for a new trial, as in the case of *Graham v. Bayne*, 18 Howard 60. See also *Guild v. Frontin*, 9 Wallace 135. In the present case it is apparent the parties below supposed that they had made up a case, according to the practice in Louisiana, from the finding of the facts by the court, that would entitle them to a re-examination of it here; but as the court did not make it up, and file it, as of the date of the trial and judgment, it cannot be regarded as a part of the record; and, under the circumstances, the case being an important one and intended to be carried up here for re-examination, we shall reverse the judgment for a mistrial and remand it to the court below for a new trial."

It is true that special provisions of law are recognized by the United States courts in Louisiana, but it was not based upon any of these peculiar provisions that the above judgment was rendered.

In the case of *Burr v. Des Moines R. R. & Nav. Co.*, 1 Wallace 99, we quote from the syllabus of the court, where the opinion is condensed:

“Legal presumption being in favor of a judgment regularly rendered, the court, where it does not reverse nor dismiss for want of jurisdiction, might, in regard to a case which it refused to consider on evidence adduced, affirm simply. However, a case being before it, and having been argued on its merits, where counsel on both sides erroneously supposed that they had brought up a case stated, when in fact they brought up nothing but a mass of evidence, and where they erroneously supposed, also, that they would obtain an opinion and judgment of this court on the case, as by common consent, they presented it, the court benignantly ‘dismissed’ it only; so leaving the parties at liberty to put the case, if they could, by agreement below, in a shape where it could be here reviewed. But the dismissal was with costs.”

In the case of *Graham v. Bayne*, 18 Howard (U. S.) 60, the syllabus of the court is as follows:

“Where a case was tried in the Circuit Court of the United States, in which both parties agreed that matters of law and fact should be submitted to the court, and it was brought to this court upon a bill of exceptions which contained all the evidence, this court will remand the case to the Circuit Court with directions to award a *venire de nova*.”



We submit to this court that it is believed that the appeal in this case has merit and that the trial court committed error, and therefore, in the event that this appeal cannot be inquired into as to the merits thereof owing to the failure to waive a jury in writing, then that this court remand the same for a new trial.

If counsel for the plaintiff in error is wrong in both of the contentions urged herein then we desire to submit to the court that the authorities are uniform in holding where there is a failure to waive a jury in writing the appellate court can inquire into the jurisdiction of the court and further ascertain whether or not the judgment so rendered is supported by the pleadings.

Counsel for the plaintiff in error at the conclusion of the trial moved the court for judgment upon the pleadings (transcript of record, page 61, assignments of error, transcript of record, page 217), which the court overruled. One of the grounds of the motion being that the plaintiff had pleaded as a defense the unliquidated, unpaid claims of the Sullivan Company, and that owing to the same the defendant would be compelled to pay them in the future. We have urged at length in our former brief the reason why the allegations in reference thereto did not constitute a proper defense or matter of set-off, and refer to the same at this time. If we are correct in our assumption then the judgment of the lower court is not sustained by the pleadings, particularly upon



the point just mentioned, and the plaintiff would be entitled to a reversal and a judgment irrespective of the waiver of a jury.

To the effect that the appellate court can examine the pleadings to ascertain if the judgment is supported thereby we refer to

Cudahy Packing Company v. Soo National Bank, 69 Fed. 782.

Campbell v. Boyreau, 21 Howard 223.

Rogers v. United States, 12 Sup. Ct. Rep. 91.

In conclusion we desire to submit to this court that the urging of such a technical proposition, to-wit, that a failure to waive a jury, in writing, precludes an examination of the assigned errors by appeal is not in harmony with the present administration of justice as the same is administered in this court and others. On the other hand, if this appellate court recognizes its limitations on account of the manner of waiver of the jury then the same limitations ought to apply to the *nisi prius* court, and any thing done there not in strict conformity to the law would be a mistrial and cannot result in a binding judgment.

We must confess the error of the attorneys for the plaintiff in error and admit that the condition now being discussed is created owing to their lack of knowledge of a technical practice for which no condition ought to be blamed. However, frankly confessing our fault, we believe that justice would

be better served in all cases like the one at bar if the appeal were inquired into upon its merits, and this we ask the court to do or else remand the cause for a new trial or else enter judgment for the plaintiff upon the pleadings.

Respectfully submitted,  
WOOD, MONTAGUE & HUNT,  
Attorneys for Plaintiff in Error.

No. 2326

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

COEUR d'ALENE LUMBER COMPANY, a Corporation,

Plaintiff in Error,

VS.

O. J. THOMPSON,

Defendant in Error.

---

Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the District of Idaho,  
Northern Division.

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FILED

NOV 18 1913



No. 2326

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**For the Ninth Circuit.**

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Plaintiff in Error,

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Admission of Service of Bill of Exceptions....	234
Admission of Service of Citation and Writ of Error .....	255
Admission of Service of Petition for Writ of Error and Assignment of Errors.....	248
Amended Answer .....	9
Assignment of Errors .....	237
Attorneys, Names and Addresses of.....	1
Bond on Writ of Error.....	249
Certificate of Clerk U. S. District Court to Tran- script of Record.....	257
Citation (Original) .....	255
Complaint .....	1
Defendant's Bill of Exceptions.....	27
Demurrer to Complaint .....	6

## EXHIBITS:

Defendant's Exhibit No. 1—Memorandum of Agreement Dated September 14, 1907, Between the Coeur d'Alene Lum- ber Company and Schmidt Brothers..	162
Instructions of the Court.....	220
Judgment .....	19

Index.	Page
Motion for a Nonsuit, etc.....	159
Motion for Leave to Make an Interlineation in Paragraph 7 of Complaint, etc.....	146
Names and Addresses of Attorneys.....	1
Order Allowing Writ of Error and Fixing Amount of Bond.....	248
Order Extending Time Sixty Days to File Bill of Exceptions, etc.....	22
Order Extending Time to August 25, 1913, to Serve Bill of Exceptions.....	26
Order Overruling Demurrer.....	8
Order Settling Bill of Exceptions.....	233
Petition for Writ of Error.....	236
Plaintiff's Exceptions to Instructions Given and Refused .....	230
Praeipie for Transcript.....	252
Return to Writ of Error.....	257
Stipulation as to Costs.....	25
Stipulation Extending Time to Answer, etc....	9
Stipulation for the Settlement of Bill of Excep- tions .....	235
Stipulation That Decision of Appellate Court in Cause Entitled Thompson vs. Coeur d'Alene Lumber Co. be Binding upon and Decide Cause Entitled Moore vs. Coeur d'Alene Lumber Co. etc.....	23
TESTIMONY ON BEHALF OF PLAINTIFF:	
HOWARD, ADAM.....	110
Cross-examination.....	113
HUNT, JAMES C.....	40
Cross-examination.....	44

Index.

Page

TESTIMONY ON BEHALF OF PLAIN-

TIFF—Continued:

Redirect Examination ..... 47

Recross-examination.. . . . 47

Redirect Examination.... . 47

Recross-examination..... 48

JONES, FRANK B..... 101

Cross-examination.. . . . 105

Redirect Examination . . . . . 109

Recalled..... . 134

Recalled in Rebuttal..... 215

Cross-examination . . . . . 216

McCLURE, GEORGE F..... 96

Cross-examination.. . . . 98

Redirect Examination.... . 101

MAYNARD, ELIZABETH.... . 128

Cross-examination.. . . . 131

MOORE, ELIJAH O..... 143

Cross-examination . . . . . 145

MOORE, MRS. MAY..... 52

SCOTT, JOSEPHINE GRACE MAY-

NARD..... 117

Cross-examination.. . . . 123

THOMPSON, MRS. CLARA..... 49

Recalled in Rebuttal..... 214

THOMPSON, OLIVER J..... 54

Cross-examination . . . . . 69

Redirect Examination . . . . . 69

Recalled . . . . . 137

Cross-examination . . . . . 138

Recalled . . . . . 159

	Index.	Page
TESTIMONY ON BEHALF OF PLAIN-		
TIFF—Continued:		
Recalled in Rebuttal.....		210
Cross-examination .....		212
WARNER, ANDREW .....		69
Cross-examination .....		78
Redirect Examination .....		81
WARNER, KENNETH .....		82
Cross-examination .....		87
Redirect Examination .....		93
Recross-examination .....		94
Redirect Examination .....		95
TESTIMONY ON BEHALF OF DEFENDANT:		
CARROLL, J. T.....		206
Cross-examination .....		208
SCHMIDT, CHARLES .....		196
Cross-examination .....		202
Redirect Examination .....		205
SCHMIDT, EDWARD .....		190
Cross-examination ....		194
Redirect Examination .....		196
SCHMIDT, WILLIAM .....		161
Cross-examination .....		183
Redirect Examination .....		187
Recross-examination .....		189
Redirect Examination .....		190
Verdict .....		19
Writ of Error (Original).....		253



**[Names and Addresses of Attorneys.]**

McFARLAND & McFARLAND, Coeur d'Alene,  
Idaho,

C. L. HEITMAN, Spirit Lake, Idaho,  
Attorneys for Plaintiff in Error.

WHITLA & NELSON, Coeur d'Alene, Idaho,

W. H. PLUMMER, Spokane, Washington,  
Attorneys for Defendant in Error.

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*In the District Court of the United States, for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

THE COEUR d'ALENE LUMBER COMPANY,  
a Corporation,

Defendant.

**Complaint.**

Plaintiff complains of defendant and for cause of  
action alleges:

**I.**

That the above-named plaintiff, O. J. Thompson,  
is now, and was at all times herein mentioned, a resi-  
dent and citizen of the State of Idaho, and the father  
of Bernarr Thompson, a minor, deceased.

**II.**

That the above-named defendant is now, and was  
at all times herein mentioned, a corporation, created,

the lands of said defendant, and the well or cistern herein complained of was located adjoining said sawdust pile so that said sawdust pile partially surrounded the same, and by reason of the location of said sawdust pile the lands of defendant attracted children thereto to play thereon and upon said sawdust pile surrounding said well or cistern.

#### VIII.

That the dangerous condition of said premises and the danger of small children falling in the said well or cistern and becoming drowned, and the habitual use of said premises by said Bernarr Thompson and other companions and children of tender years was open and notorious up to the time of the death of said Bernarr Thompson, and was well known to said defendant, but on account of the tender years of said Bernarr Thompson he did not know or appreciate the dangerous conditions of said premises or injury or death resulting from being in or upon said premises, and in and about said well or cistern, but [3] nevertheless defendant utterly failed, neglected and refused to cover up or fill up said dangerous cistern or well, which negligence and carelessness on the part of said defendant was the proximate and sole cause of the death of said Bernarr Thompson, above mentioned.

#### IX.

That on, to wit, June 1st, 1911, said Bernarr Thompson in company with other children playing in, about and upon said premises and close to and in the immediate vicinity of said well or cistern, which, at the time was filled on a level with the ground with

water, and said Bernarr Thompson while so playing therein and thereabout, accidentally and inadvertently fell into said well or cistern and was drowned.

X.

That by reason of the death of said Bernarr Thompson, by the recklessness, negligence and carelessness and the wrongful act of said defendant, plaintiff has been damaged in the sum of Ten Thousand Dollars (\$10,000.00), no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the above-named defendant for the sum of Ten Thousand Dollars, (\$10,000.00), and his costs and disbursements herein.

W. H. PLUMMER,  
Attorney for Plaintiff. [4]

State of Washington,  
County of Spokane,—ss.

O. J. Thompson, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on his information or belief, and as to those matters he believes them to be true.

OLIVER J. THOMPSON.

Subscribed and sworn to before me this 20th day of June, 1912.

[Seal]

W. H. PLUMMER,  
Notary Public in and for the State of Washington,  
Residing at Spokane.

[Endorsed]: Filed June 22, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk.  
[5]

---

*In the District Court of the United States, for the  
District of Idaho, Northern Division.*

ELIJAH O. MOORE,

Plaintiff,

vs.

THE COEUR d'ALENE LUMBER COMPANY,  
a Corporation,

Defendant.

**Demurrer to Complaint.**

Now comes the above-named defendant, Coeur d'Alene Lumber Company, a corporation, and demurs to the complaint of the plaintiff herein and for causes of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That said complaint is uncertain, unintelligible and ambiguous in this: that it is not alleged therein, and does not appear thereby how long prior to the first day of June, 1911, defendant owned, operated or maintained the sawmilling and woodworking plant, mentioned in paragraph four of said complaint, and further in this, that it does not appear from said complaint how long prior to the first day of June, 1911, defendant caused all of the said buildings, machinery, and appliances, mentioned in para-



graph five of said complaint, to be removed off of the lands and premises mentioned in the complaint herein. And that said complaint is further ambiguous, uncertain and unintelligible in this; that it does not appear therefrom or thereby in what manner or how or by what means defendant recklessly, negligently or carelessly maintained [6] said well and cistern, as alleged in paragraph six of said complaint, or in what said alleged carelessness, recklessness and negligence consists.

WHEREFORE defendant prays that plaintiff take nothing by his said action, and that the same be dismissed, with costs to this defendant.

McFARLAND & McFARLAND,

Attorneys for Defendant.

P. O. Address, Coeur d'Alene, Idaho.

State of Idaho,

County of Kootenai,—ss.

I, R. E. McFarland, a member of the law firm of McFarland & McFarland, the attorneys for the defendant in the above-entitled action, do hereby certify that I am one of the attorneys for the defendant in said action; that I have read the above and foregoing Demurrer and know the contents thereof, and that in my opinion it is well founded in point of law.

Dated this 8th day of July, A. D. 1912.

R. E. McFARLAND,

Attorney for Defendant.

P. O. Address, Coeur d'Alene, Idaho.

[Endorsed]: Filed July 10, 1912. A. L. Richardson, Clerk. [7]



At a stated term of the United States District Court for the District of Idaho, Northern Division, held at Coeur d'Alene, Idaho, on Saturday, the 23d day of November, 1912. Present: Hon. FRANK S. DIETRICH, Judge.

No. 544.

O. J. THOMPSON

vs.

THE COEUR d'ALENE LUMBER COMPANY.

**Order Overruling Demurrer.**

On this day this cause came on to be heard upon the demurrer of the defendant to the complaint herein, and after argument of counsel, R. E. McFarland, Esq., on behalf of defendant, and Ezra R. Whitla, Esq., on behalf of plaintiff, the Court being fully advised in the premises, ordered that said demurrer be, and the same is hereby overruled, and said defendant is given thirty days from this date to file and serve its answer. [8]

---

*In the District Court of the United States for the District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR d'ALENE LUMBER COMPANY, a Corporation,

Defendant.

**Stipulation Extending Time to Answer, etc.**

It is hereby agreed and stipulated by and between the above-named plaintiff and the above-named defendant that said defendant may have and it is hereby given and granted until the 10th day of March, A. D. 1913, in which to file and serve its answer to the complaint in the above-entitled action, and that plaintiff have and is hereby given and granted thirty days thereafter in which to demur or plead to said answer.

W. H. PLUMMER,

Attorney for Plaintiff.

McFARLAND & McFARLAND,

Attorneys for Defendant.

[Endorsed]: Filed Feb. 17, 1913. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk.  
[9]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR d'ALENE LUMBER COMPANY, a Corporation,

Defendant.

**Amended Answer.**

Now comes the defendant above named, by leave of Court first obtained and files this its amended an-

swer, and for answer to the complaint of the plaintiff herein and for defense to plaintiff's cause of action, shows to the court:

### I.

That as to the allegations contained in paragraph three of the complaint herein, viz., that upon and some time prior to the first day of June, 1911, the said Bernarr Thompson was living with his father, the plaintiff herein, in the city of St. Maries, Idaho, and said Bernarr Thompson was at the time of his death a minor child of the age of eight years, and the son of plaintiff, this defendant alleges that it has no information or belief upon the subject of said allegations sufficient to enable it to answer the same, and it therefore denies said allegation and places its denial on that ground, and denies that upon and some time prior to the first day of June, 1911, or at any other time, the said Bernarr Thompson was living with his father, the plaintiff herein, in the city of St. Maries, Idaho, and denies that said Bernarr Thompson was at the time of his death [10] a minor child of the age of eight years, or the son of plaintiff.

### II.

Answering paragraph four of said complaint, defendant denies that for some time prior to said June 1st, 1911, or at any other time, the defendant owned, operated or maintained a certain sawmilling or wood-working plant, consisting of buildings, machinery, appurtenances or appliances, located or situated upon lands of defendant in the city of St. Maries, Idaho, or that, as a part of said plant, defendant caused to be excavated or dug a certain cistern or

well, or any cistern or well, which was used by said defendant company for the storage of water to be used in operating said milling plant, or otherwise, or at all.

### III.

That in answer to paragraph five of said complaint, defendant denies that some months prior to said first day of June, 1911, or any other time, or at all, defendant caused all or any of said buildings, machinery, or appliances to be moved off of said lands in said city of St. Maries, or carelessly or negligently failed to fill or cover up said cistern, well or excavation, or carelessly or negligently or recklessly, or otherwise, or at all, permitted said well or cistern, or any well or cistern, to remain open up to or including the time that said Bernarr Thompson was killed, or at any other time.

### IV.

That in answer to paragraph six of said complaint, defendant denies that at the time of the death of said Bernarr Thompson, or at any other time, said well or cistern had become filled with water, or was of the depth of ten feet, or any other [11] depth, or was maintained by the defendant company carelessly, negligently or recklessly, or otherwise, or at all, or was extremely dangerous to children of tender years, or at all, or to others who had occasion to go in or upon said premises, either for business or pleasure, or otherwise or at all, or that said lands, maintained as alleged in said complaint, or otherwise, or at all, by defendant, constituted or were or was dangerous premises.

## V.

That in answer to paragraph seven of said complaint, defendant denies that for many months prior to the death of said Bernarr Thompson, he, with other or numerous children living in said town, would frequently or habitually go upon, over or across said lands for the purpose of play or amusement, or that all of which was known to defendant, or could have been known in the exercise of reasonable care, or ought to have been, or was anticipated by said defendants, its agents, or servants, or otherwise or at all, and denies that this defendant knew that said Bernarr Thompson, or any other child or children living in said town or elsewhere, would frequently or habitually go upon or over or across said lands or premises in the vicinity of said alleged cistern or well for the purpose of play or amusement, or otherwise, or at all, and denies that said defendant could have known, with the exercise of reasonable care, that the said Bernarr Thompson, or any other child or children, would frequently or habitually, or otherwise or at all, go upon or over or across said lands and premises, or that such fact or facts ought to have been or was anticipated by defendant, or its agents or servants.

## VI.

In answer to paragraph eight of said complaint, defendant denies that the alleged dangerous or any condition of said premises, [12] or the danger of small children falling into said alleged well or cistern or becoming drowned, or the habitual use of said premises by said Bernarr Thompson or other com-



panions or children of tender years, or of any years, was open or notorious up to the time of the death of said Bernarr Thompson, or otherwise, or at all, or was well known to said defendant at said time, or any time, or at all, and denies that, on account of the alleged tender years of said Bernarr Thompson, or otherwise or at all, he, the said Bernarr Thompson, did not know or appreciate the alleged dangerous conditions of said premises, or injury or death resulting from being in or upon said premises, or in or about said alleged well or cistern, and denies that said premises were in a dangerous condition, and denies that defendant utterly or at all failed, neglected or refused to cover up or fill up said alleged dangerous cistern or well, and denies that the alleged negligence or carelessness on the part of said defendant, or any negligence or carelessness on the part of defendant, was the approximate or sole or any cause of the death of said Bernarr Thompson as alleged, or otherwise, or at all.

## VII.

That in answer to paragraph nine of said complaint, defendant denies that on, to wit, June 1st, 1911, or at any other time, said Bernarr Thompson, in company with other children, playing in, about or upon said premises, or close to or in the immediate vicinity of said alleged well or cistern, which it is alleged at said time was filled on a level with the ground with water, or otherwise, or at all, or said Bernarr Thompson, while playing thereon or thereabout, accidentally or inadvertently fell into said well or cistern or was drowned, and denies that [13]

said Bernarr Thompson at any time or under any circumstances, or at all, fell into any well or cistern upon the premises of defendant, either accidentally or inadvertently, or otherwise, or at all, and denies that the said Bernarr Thompson was drowned in any well or cistern on the premises of defendant.

### VIII.

In answer to paragraph ten of said complaint, the defendant denies that by reason of the death of said Bernarr Thompson or by the alleged recklessness, negligence or carelessness or wrongful act of defendant, plaintiff has been damaged in the sum of ten thousand dollars (\$10,000), or any other sum, and denies that the death of said Bernarr Thompson was caused by the recklessness, negligence, carelessness or wrongful act of defendant, or otherwise, or at all.

And for another, further and affirmative answer and defense herein, defendant alleges:

### I.

That at all of the times mentioned in the complaint herein and hereinafter mentioned, defendant was the owner of the northeast quarter of the northeast quarter (NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ) of section twenty-seven (27) township forty-six (46) north of range two (2) west, Boise meridian, in Kootenai County, State of Idaho; that on the 14th day of September, A. D. 1907, defendant entered into a certain written contract by and with William Schmidt and Edward Schmidt, then copartners doing business under the firm name of Schmidt Brothers, to manufacture into timber and lumber for defendant, all of the logs then being on fractional section twenty-seven (27) town-

ship forty-six (46) north of range two (2) west of Boise meridian; that thereupon the said Schmidt Brothers located their sawmill on said northeast quarter of the northeast [14] quarter (NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ) and immediately commenced operating said sawmill and manufacturing said logs into timber and lumber, and continued so to do up to and including some time in the month of October, A. D. 1908.

## II.

That in the operation of said sawmill by said Schmidt Brothers, and without the knowledge of defendant, sawdust accumulated in piles adjacent to said sawmill; that back of said sawmill there was and is a small ravine, through which water flowed, and which sloped from the hillside toward the millsite of said Schmidt Brothers and terminated at the said piles of sawdust into a small pond or sink; that said pond so formed as aforesaid, was about twenty-five (25) or thirty (30) feet long, by about twelve (12) or fifteen (15) feet wide; and at all of the times herein mentioned remained open, unenclosed and uncovered, and was and is off and out of the way of any public highway, road, street or alley; that said pond was formed and caused by said Schmidt Brothers in leaving upon said mill site, viz., said northeast quarter of the northeast quarter (NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ) as aforesaid, piles of sawdust against which the waters in said ravine flowed, stood and remained. That if said Schmidt Brothers dug or left upon said premises any hole, well or cistern, defendant had no knowledge thereof.

## III.

That some time in the month of October, A. D. 1908, the exact date of which is unknown to defendant, said Schmidt Brothers ceased operating said sawmill and removed the same and all of their property constituting the sawmill plant from said premises, but left thereon remaining said piles of sawdust and pond or sink. [15]

## IV.

That at no time has defendant operated or owned or participated in the operation of a sawmill in or upon said premises, or any part thereof, and that defendant has not at any time caused to be dug, made, kept or maintained upon said premises, or any part thereof, any well, cistern, pond or sink.

## V.

That defendant did not know or had no means or opportunity of knowing or ascertaining that said Bernarr Thompson, or any other boy or boys, or child or children, were in the habit of going upon or frequenting said premises, and had no knowledge or means of knowing or ascertaining that the said Bernarr Thompson, or any other child or children, had ever at any time been upon said premises, or any part thereof.

## VI.

That defendant is informed and believes, and upon information and belief alleges, that on or about the 1st day of June, 1911, the said Bernarr Thompson, and another boy by the name of Russell G. Moore, unknown to this defendant and to said Schmidt Brothers, entered upon said premises, removed and



took off their stockings and shoes, and went wading in and through said pond, and, while so wading in said pond, became drowned, without any fault or negligence on the part of this defendant.

And for another, further, separate and affirmative answer and defense herein, defendant alleges:

I.

That at all of the times mentioned in said complaint and herein mentioned, plaintiff knew of the existence of said pond or sink, and knew that said Bernarr Thompson was in the habit of going upon said premises, and that it was the duty of plaintiff to exercise care, control and supervision over him, the said Bernarr Thompson [16] and to prevent and restrain him from entering said premises, and from going near, in or about said pond, but that plaintiff, disregarding his duty in the premises, carelessly, negligently and knowingly permitted the said Bernarr Thompson to frequent said premises and to go in wading in said pond, and carelessly and negligently omitted to prevent and restrain the said Bernarr Thompson from entering said premises and going wading in said pond, by reason whereof the said Bernarr Thompson did, as aforesaid, enter said premises and go into said pond to wade and became drowned, as aforesaid, and that the carelessness and negligence of plaintiff in failing and omitting to control, take care of and exercise supervision over the said Bernarr Thompson, and in carelessly and negligently omitting to prevent and restrain the said Bernarr Thompson from entering said premises and going into said pond swimming, contributed to and



were and are the approximate causes of the death of him, the said Bernarr Thompson.

WHEREFORE, defendant prays that plaintiff take nothing by his said action, and that the same be dismissed with costs to defendant.

McFARLAND & McFARLAND,  
Attorneys for Defendant. P. O. Address, Coeur  
d'Alene, Idaho. [17]

State of Idaho,  
County of Kootenai,—ss.

J. T. Carroll, being first duly sworn, deposes and says, that he is the Vice-president and General Manager of the Coeur d'Alene Lumber Company, the corporation defendant named in the foregoing amended answer, and that he makes this verification for and on behalf of said corporation; that he has read said amended answer, knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

J. T. CARROLL.

Subscribed and sworn to before me this 25th day of March, A. D. 1913.

[Notarial Seal]

A. GRANTHAM,  
Notary Public.

[Endorsed]: Filed, March 25, 1913. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [18]

*United States District Court, Northern Division,  
District of Idaho.*

O. J. THOMPSON,

Plaintiff,

vs.

THE COEUR d'ALENE LUMBER COMPANY,  
Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff and assess the damages at the sum of (\$2500.00) Twenty-five hundred dollars.

W. A. ALEXANDER,

Foreman.

[Endorsed]: Filed June 7, 1913. A. L. Richardson, Clerk. [19]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR d'ALENE LUMBER COMPANY, a Corporation,

Defendant.

**Judgment.**

This action came regularly on for trial in open court on the 6th day of June, A. D. 1913, before the Court and a jury of twelve good and lawful men se-

lected from the Northern Division of this District, to try said cause, W. H. Plummer and Whitla & Nelson appearing as attorneys for the plaintiff, and McFarland & McFarland and Chas. L. Heitman appearing as attorneys for the defendant; thereupon witnesses were sworn and testified and documentary evidence was introduced on behalf of the plaintiff, and witnesses were sworn and testified and documentary evidence was introduced on behalf of the defendant, and after the introduction of all the evidence as aforesaid, the cause was argued by respective counsel, and after the argument of counsel the Court instructed the jury, and thereupon the jury retired to consider of their verdict and subsequently returned into open court on the 7th day of June, 1913, and announced that they had returned their verdict, which said verdict was in words and figures as follows, to wit: [20]

*“United States District Court, Northern Division,  
District of Idaho.*

O. J. THOMPSON,

Plaintiff,

vs.

THE COEUR d'ALENE LUMBER COMPANY,  
Defendant.

### VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff and assess the damages at the sum of \$2500.00—Twenty-five Hundred Dollars.

W. A. ALEXANDER,

Foreman.”

Thereupon said jury was duly polled and each of said twelve jurymen were asked if said verdict for twenty-five hundred dollars in favor of the plaintiff and against the defendant was their verdict, and each and all of said jurymen replied that it was;

NOW, THEREFORE, by reason of the law and premises and verdict aforesaid, it is hereby ORDERED, ADJUDGED AND DECREED that O. J. Thompson, the above-named plaintiff, do have and recover of and from the defendant, the Coeur d'Alene Lumber Company, a corporation, the sum of Twenty-five Hundred Dollars (\$2500.00), together with plaintiff's costs and disbursements necessarily incurred herein, taxed in the further sum of \$241.11, which said sums are to bear interest at the rate of seven per cent per annum from the date hereof.

Dated this 7th day of June, A. D. 1913.

[Endorsed]: Filed June 7, 1913. A. L. Richardson, Clerk. [21]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR d'ALENE LUMBER COMPANY, a Corporation,

Defendant.

ORDER EXTENDING TIME TO PROPOSE AND  
SERVE BILL OF EXCEPTIONS AND AFFI-  
DAVITS ON MOTION FOR NEW TRIAL.

**Order Extending Time [Sixty Days to File Bill of  
Exceptions, etc.].**

The plaintiff consenting thereto, and good and sufficient reasons appearing therefor, upon the motion of McFarland & McFarland and C. L. Heitman, the attorneys for the defendant in the above-entitled action, it is hereby ordered that said defendant have sixty (60) days from the date hereof, in which to prepare, propose, serve and present, its bill of exceptions containing all of the exceptions and proceedings taken in and upon the trial of the said cause, and also in which to file and serve affidavits on motion for a new trial therein.

Said bill of exceptions to contain all of the testimony, rulings, exceptions and proceedings had during the trial of the above-entitled action, and may be used upon motion for a new trial herein, and upon an appeal in the event that such new trial is denied.

Dated this 7th day of June, A. D. 1913.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed June 9, 1913. A. L. Richardson, Clerk. [22]



*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR d'ALENE LUMBER COMPANY, a Cor-  
poration,

Defendant.

**Stipulation [That Decision of Appellate Court in  
Cause Entitled Thompson vs. Coeur d'Alene  
Lumber Co. be Binding upon and Decide Cause  
Entitled Moore vs. Coeur d'Alene Lumber Co.,  
etc.].**

WHEREAS the above-entitled cause was tried jointly in the above-entitled court with the case of Elijah O. Moore, Plaintiff, vs. Coeur d'Alene Lumber Company, a Corporation, Defendant, being the same defendant as in this action, and the same witnesses were introduced, and the same evidence considered in both cases, and the same instructions given, and the same proceedings had in both cases, but separate verdicts were found and separate judgments rendered; and

Whereas, the said defendant intends to appeal the case of O. J. Thompson, Plaintiff, vs. Coeur d'Alene Lumber Company, Defendant; and

Whereas, it is the desire of both parties to avoid unnecessary expense and labor,

Now, therefore, it is hereby stipulated and agreed by and between the respective counsel for the said O. J. Thompson and the said Elijah O. Moore, plain-

tiffs, and the said Coeur d'Alene Lumber Company, a corporation, defendant, that the decision of the appellate court in the case of said O. J. Thompson, Plaintiff, vs. said Coeur d'Alene Lumber Company, a Corporation, Defendant, be binding upon and decide the case of [23] the said Elijah O. Moore, Plaintiff, vs. Coeur d'Alene Lumber Company, a corporation, Defendant, and that no further proceedings shall be taken by either party in the case of said Elijah O. Moore, against said Coeur d'Alene Lumber Company, a corporation, pending the hearing and determination of said defendant's appeal in the case of said O. J. Thompson against said Coeur d'Alene Lumber Company, a corporation, defendant, and that the final disposition of the case of said Elijah O. Moore, against said defendant Coeur d'Alene Lumber Company, shall be determined by the decision of the Appellate Court in all respects in the case of the said O. J. Thompson against said defendant Coeur d'Alene Lumber Company.

Dated this 16th day of June, A. D. 1913.

W. H. PLUMMER,

P. O. Address, Spokane, Washington,  
WHITLA & NELSON,

P. O. Address, Coeur d'Alene, Idaho,  
Attorneys for O. J. Thompson and Elijah O. Moore.

McFARLAND & McFARLAND,

P. O. Address, Coeur d'Alene,  
CHAS. L. HEITMAN,

P. O. Address, Spirit Lake, Idaho,  
Attorneys for Defendant Coeur d'Alene Lumber  
Company.

[Endorsed]: Filed June 21, 1913. A. L. Richardson, Clerk. [24]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR d'ALENE LUMBER COMPANY, a Corporation,

Defendant.

**Stipulation as to Costs.**

Whereas, the above-entitled cause was tried jointly and in conjunction with the case of Elijah O. Moore against the same defendant, Coeur d'Alene Lumber Company, a corporation, and the same witnesses were introduced, and the same evidence considered, and the same costs and expenses incurred, except as hereinafter set forth both in this case and in the case of Elijah O. Moore against the same defendant, as hereinafter set forth; and

Whereas said plaintiffs have filed two separate cost-bills in said actions;

Now, therefore, it is hereby stipulated and agreed by and between the respective counsel for said O. J. Thompson and said Elijah O. Moore, plaintiffs, and the said Coeur d'Alene Lumber Company, a corporation, defendant, that, in the event of an affirmation by the Appellate Court of the separate judgments rendered in said separate actions, jointly tried, but one cost bill shall be paid by said defendant, except

that the fees of the clerk of this court shall be paid in each case, and Mrs. O. J. Thompson and Mrs. Elijah O. Moore shall each be allowed single witness fees.

Dated this 16th day of June, A. D. 1913. [25]

W. H. PLUMMER,

P. O. Address, Spokane, Washington,

WHITLA & NELSON,

P. O. Address, Coeur d'Alene, Idaho,

Attorneys for O. J. Thompson and Elijah O. Moore.

McFARLAND & McFARLAND,

P. O. Address, Coeur d'Alene, Idaho,

CHAS. L. HEITMAN,

P. O. Address, Spirit Lake, Idaho,

Attorneys for Defendant, Coeur d'Alene Lumber Company.

[Endorsed]: Filed June 21, 1913. A. L. Richardson, Clerk. [26]

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**[Order Extending Time to August 25, 1913, to Serve  
Bill of Exceptions.]**

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR d'ALENE LUMBER COMPANY, a Corporation,

Defendant.

ORDER EXTENDING TIME FOR SERVING  
PROPOSED BILL OF EXCEPTIONS.

Now, at this day upon motion of Chas. L. Heitman, Esq., of counsel for the defendant in the above-entitled action, IT IS ORDERED that the said defendant Coeur d'Alene Lumber Company, a corporation, have until the 25th day of August, A. D. 1913, in which to serve and prepare its proposed Bill of Exceptions in the above-entitled case.

Done at Boise, Idaho, this 23d day of July, A. D. 1913.

FRANK S. DIETRICH,  
Judge.

[Endorsed]: Filed July 23, 1913. A. L. Richardson, Clerk. [27]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR d'ALENE LUMBER COMPANY, a Corporation,

Defendant.

**Defendant's Bill of Exceptions.**

(Proceedings had June 6th, 1913.)

BE IT REMEMBERED, that heretofore on the 6th day of June, A. D. 1913, being one of the days of the May term of the District Court of the United States for the District of Idaho, Northern Division,



before the Honorable Frank S. Dietrich, Judge of said court, presiding, and a jury, this cause came on for trial on the pleadings heretofore filed herein. Messrs. W. H. Plummer and E. R. Whitla, appearing as attorneys for plaintiff, and McFarland & McFarland and Charles L. Heitman appearing as attorneys for defendant.

And thereupon the following evidence and exhibits were introduced and the following proceedings had, to wit: [28]

Mr. PLUMMER.—If your Honor please, in looking over the original complaints in these causes, I thought it would be well to file amended complaints, with the permission of the Court. The amendments have been served upon the other side. They do not change anything connected with the cases except that they make more specific certain allegations, and if there is any objection at all, it might be well to consider the matter to-morrow morning, after counsel has had a chance to look them over to-night. If they do not object, they can either file answers or consent that the present answers stand to these complaints. Any new matter set up in our amended complaints can be deemed denied.

Mr. McFARLAND.—If the Court please, I desire at this time to have Mr. C. L. Heitman entered as associate counsel in this case, and I want to say that we are familiar with the contents of the amended complaints in these cases, and we certainly object to the plaintiffs being permitted to file these amended complaints. Counsel say that they merely strengthen the allegations of the original complaints, but they

change the issues entirely. There are separate and distinct and new allegations contained in the original, and even, in some instances, the amended complaints are in conflict with the original, that is, certain allegations in them. We came here, if the Court please, and here we have been, prepared ever since the 29th of May, to go to trial in these cases, and we have had witnesses in attendance who were here on the 29th, and we certainly object to any further delay in the matter, and we are willing to have your Honor pass upon the question of granting leave to file amended complaints at this time. I think it won't take your Honor long to examine the complaints. It is only necessary to examine the amended and original complaints in one case, because they are similar in the two cases. [29]

Mr. PLUMMER.—I don't want to delay the trial, but I thought the Court possibly could compare the two complaints while we are getting the jury.

The COURT.—Perhaps you had better call my attention to the changes.

Mr. PLUMMER.—If counsel can suggest any changes, I would like to know them.

The COURT.—Take the Thompson case, for instance, and take the original complaint and call my attention to the difference. I have here the proposed amended complaint, and, if you will, take the original, and call my attention now to the changes.

Mr. HEITMAN.—Beginning with paragraph five, if your Honor please, of the amended complaint, it is alleged that—

The COURT.—Read the original. I have the

amended complaint before me, and I can follow you better.

Mr. HEITMAN.—That corresponds, if your Honor please, somewhat with paragraph four of the original.

The COURT.—Aren't the paragraphs numbered the same?

Mr. PLUMMER.—I think not, your Honor, not in every case.

Mr. HEITMAN.—There are fourteen paragraphs in the amended complaint, and ten in the original. Paragraph five of the amended complaint, which corresponds more exactly to paragraph four of the original, alleges that: "Prior to the 14th day of September, 1907, defendant had sunk and dug upon said lands a certain well, cistern and sump for the purpose of accumulating water." In paragraph four, it is said (of the original complaint), that some time prior to June 1, 1911, the defendant caused to be excavated and dug a certain cistern or well. Then in paragraph six of the amended complaint it is alleged that during the month of September,—it don't say what year,—the same year, I suppose, defendant employed William Schmidt and [30] Edward Schmidt, copartners, to construct upon said land and operate a certain sawmilling plant, for the purpose of sawing lumber for defendant. And these partners, after constructing said mill, excavated and dug another well or cistern. In the amended complaint there are two wells. In the original complaint there is only one. And there is no charge in which well the boy was drowned. And another charge here that

the well was filled up with water which was of such a colored and dirty character as to render it impossible to see the depth of said well after the same had been filled up with water. That is a new allegation, and a different charge. And then in paragraph eight of the amended complaint, that a large amount of sawdust was strewed and scattered around and upon said land surrounding said wells, which constituted an attractive and inviting place for children to congregate and play. They charge now that sawdust was the attraction.

The COURT.—Is that new?

Mr. HEITMAN.—That is new, sir; there is not a word said about sawdust in the original. Then in paragraph ten of the amended complaint: “That thereafter said lands, said sawdust piles and said wells filled with water were negligently and carelessly by defendant left to remain in the same condition as the same was after said milling plant had been removed therefrom, up to the time of the drowning and death of said Bernarr Thompson June 1, 1911, during which period of years said grounds, premises, sawdust piles and sawdust immediately surrounding said wells were constantly used as a playground and place of amusement for numerous children of tender years.” Not the wells, but the sawdust. “All of which was well known to defendant and could have been known by the exercise of reasonable care on its part, but notwithstanding the inviting and attractive character of said [31] premises, and notwithstanding the knowledge on the part of the defendant that the said premises had been



used for a number of years daily by numerous children of tender years and that said children were constantly playing, in, around, upon and about said sawdust piles and in close proximity to said wells which were continuously filled with water and of a dangerous character to children of tender years on account of the possibility and probability of being drowned therein, the defendant carelessly and negligently failed and neglected to fill up said wells, the use of which had already been abandoned for a number of years, and which filling up could have been accomplished at "a trifling expense. That said wells were of no further use or benefit—"

The COURT.—Is this paragraph ten new? Is the paragraph ten that you have just read new?

Mr. HEITMAN.—That was the amended complaint.

The COURT.—Yes, but is the matter therein set forth new, or is it the same as in the original?

Mr. HEITMAN.—It is new.

The COURT.—The whole paragraph?

Mr. HEITMAN.—It corresponds, if your Honor please, with paragraph eight, and I read that: "That the dangerous condition of said premises and the danger of small children falling in the said well or cistern and becoming drowned, and the habitual use of said premises by said Bernarr Thompson and other companions and children of tender years was open and notorious up to the time of the death of said Bernarr Thompson, and was well known to said defendant, but on account of the tender years of said Bernarr Thompson he did not know or appre-



ciate the dangerous conditions of said premises or injury or death resulting from being in or upon said premises, and in and about said well or cistern, but nevertheless defendant utterly failed, neglected and refused to [32] cover up or fill up said dangerous cistern or well, which negligence and carelessness on the part of said defendant was the proximate and sole cause of the death of said Bernarr Thompson.” That is all there is in the original complaint, and it is flatly contradicted by paragraph thirteen of the amended complaint, which says: “That plaintiff (that is, the father of Bernarr Thompson) did not know that his son, Bernarr Thompson, was playing upon said lands or in and about said wells and sawdust piles, and did not know that he had ever played there or had been there at all before, and did not know of the dangerous character of said lands and premises,” while in the original complaint it is alleged that the dangerous condition of said premises was open and notorious, up to the time of the death of the boy, a flat contradiction, if your Honor please.

We submit that it raises new issues, utterly changes the character of the action, and would necessitate the bringing of many more witnesses in order to defend. So far as the time of serving these amended complaints upon us, if your Honor please, is concerned, they were served upon us since we came into the courtroom this afternoon, since two o’clock.

Mr. PLUMMER.—If your Honor please, the only new matter alleged in this amended complaint, except an elaboration of the negligent acts on the part of the defendant, are matters and things set up in

the amended answer of the defendant.

The COURT.—Then why put them in here?

Mr. PLUMMER.—Simply because in the amended answer they allege that Schmidt Brothers, who built the mill and were running the mill were independent contractors, and that will be deemed denied, I suppose. They also allege there that this water hole, or whatever it was, was surrounded with a large amount of sawdust. We describe in this amended complaint the exact situation, [33] something we didn't know until recently, at least I didn't, but I was up there and saw it, and it could all be offered as proof under the original complaint here. It would be properly admissible under the original complaint.

The COURT.—Then why amend?

Mr. PLUMMER.—The only thing is this: The original complaint described the situation and showed its open and notorious character, that it is a place where children usually congregate to play, all of which was known by the defendant, or ought to have been known. In looking over the authorities, they hold the rule of liability to be based upon the implied invitation of the owner of the land inviting the children to come there and play, when they knew the condition of the land, and knew the children did come there, and this amended complaint is for the purpose of pleading an implied invitation. There is nothing in it to surprise the defendants. They have alleged all the new matter themselves. They have alleged the sawdust, the water hole, and this point they refer to about being open and notori-

ous; this child was up there, and there were other children. And we allege that the dangerous condition of said premises and the danger of small children falling in the said well or cistern and becoming drowned, and the habitual use of said premises by said Bernarr Thompson and other companions and children of tender years was open and notorious up to the time of the death of said Bernarr Thompson. I have found out since drawing this original complaint that Bernarr Thompson was never there before. It was an error on my part in drawing the complaint, or understanding my clients' statement, and doesn't change the issue. We allege in the amended complaint that the plaintiff didn't know that he ever went there at all; that is the only change. It is simply offered in the exercise of [34] an abundant precaution, and inasmuch as demurrer has been interposed to the original complaint, when it isn't necessary I don't want to take a chance in the Circuit Court of Appeals of being in error there simply because I didn't plead there that these defendants invited the boys on the ground, as the liability is based on the implied invitation; otherwise they would be trespassers. That is the only reason it is offered, and nobody can be surprised, because they know all about it, and have pleaded it in their answer.

Mr. McFARLAND.—Now, if the Court please, one of the most material amendments is made to paragraph seven of the original complaint, which I will read: "That for many months prior to the death of said Bernarr Thompson, he, with other and nu-

merous children living in said town, would frequently and habitually go upon, over and across said lands and premises in the vicinity of said cistern or well for the purpose of play and amusement, all of which was known by defendant, and could have been known in the exercise of reasonable care, and ought to have been, and was anticipated by said defendant, its agents and servants."

Now, paragraph eight of the proposed amended complaint is intended to correspond with that paragraph seven of the original, and here is what it has to say: "That said milling plant for the manufacturing of lumber was carried on for some months by said Schmidt Brothers and a large amount of sawdust was strewed and scattered around and upon said lands and surrounding said wells, as aforesaid, and constituted an attractive and inviting place for children of tender years to congregate and play."

There wasn't any allegation about it being an attractive place or an inviting place in the original, and besides that, the original speaks of one well, and the amended speaks of two, [35] and we think it is rather late at this time, if the Court please, for them to come in and be permitted to file an amendment which certainly takes the defendant by surprise, and which changes the whole nature of their alleged cause of action. Your Honor will remember that in the original complaint there is no allegation or intimation that the plaintiffs and the children did not know that these were dangerous, but, on the contrary, the original complaint said that the dangerous and unsafe condition of this place was



open and notorious, which carried the idea or the theory that the parents of the boys and the boys knew of the alleged dangerous condition of the premises.

Mr. PLUMMER.—That last suggestion, I suppose, I would have a right to answer, that about paragraph seven there: “That for many months prior to the death of said Bernarr Thompson, he, with other and numerous children living in said town, would frequently and habitually go upon, over and across said lands and premises in the vicinity of said cistern or well for the purpose of play and amusement, all of which was known by defendant, and could have been known in the exercise of reasonable care.” Even if at the time that he verified that original complaint, even if he then did know that his son had habitually, previous to that time, frequented that ground, that isn’t even an implied allegation that he knew it at the time of the accident. People find out lots of things after a thing happens that they don’t know before. Unless he knew at the time of the accident that that was a dangerous place for his boy to be, and still let his boy go on the ground there and play with other boys, he would then assume the risk and couldn’t recover. There is no allegation that he knew it before the accident.

With reference to the two wells, if your Honor please, the answer sets up the fact that there are no wells there at all. [36] If there isn’t one, there can’t be two. Paragraph four of the answer: “That at no time has defendant operated or owned or participated in the operation of a sawmill in or upon said premises, or any part thereof, and that defend-



ant has not at any time caused to be dug, made, kept or maintained upon said premises, or any part thereof, any well, cistern, pond or sink." They certainly can't be surprised.

The COURT.—You think if they aren't surprised by one they couldn't be surprised by two?

Mr. PLUMMER.—No, your Honor.

Mr. HEITMAN.—The amended complaint alleges that one well was dug by the defendant, the other that it was dug by Schmidt Brothers. I think that the allegations of the complaint tend to show that Schmidt Brothers were independent contractors, and the question of two wells would become important there. Now, Mr. Plummer, I understood, asserted that there is nothing in the original complaint alleging that the plaintiff knew of the dangerous condition of these wells, or this one well that is referred to in the original complaint, and at the time of the death of the boy. Now, here is what paragraph eight says: "That the dangerous condition of said premises and the danger of small children falling in the said well or cistern and becoming drowned, and the habitual use of said premises by said boy and other companions and children of tender years was open and notorious up to the time of the death of said boy."

Mr. PLUMMER.—Read the rest now.

Mr. HEITMAN.—"And was well known to said defendant." I am talking about the plaintiff's contributory negligence, if your Honor please. "And the habitual use of said premises was open and notorious up to the time of the death of the said boy,"—

a flat contradiction, if the Court please. [37]

The COURT.—Gentlemen, the amendment comes very late. In the absence of some showing as to why it comes so late I shall not permit it.

Mr. PLUMMER.—I suppose that during the trial we can make the showing. Of course we can't do that now.

Mr. McFARLAND.—We object to that, if the Court please, for we are ready for trial.

Mr. PLUMMER.—We are ready for trial on the original complaint, but the Court can order an amendment during the trial, and conform to the evidence.

The COURT.—Well, we will cross that bridge when we come to it. There was some suggestion on the part of counsel for both sides that we could consolidate these cases for trial.

Mr. PLUMMER.—Yes, I think we ought to.

Mr. McFARLAND.—We have no objection, your Honor.

The COURT.—Very well, they may be consolidated merely for the purpose of trial. There will be separate verdicts, and the records will, of course, be made separate in the case of further appeal. Call the jury, Mr. Clerk. The record will show that this is done on consent.

(The jury was thereupon impaneled, and the following proceedings were had, to wit:) [38]

**[Testimony of James C. Hunt, for Plaintiff.]**

JAMES C. HUNT, a witness called and duly sworn on behalf of the plaintiffs, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. State your name.      A. James C. Hunt.

Q. Where do you reside?      A. St. Maries.

Q. How long have you resided there?

A. Since 1905.

Q. What business have you been engaged in since you have resided there?

A. I have been engaged in the lumber business, and connected with the Milwaukee Railroad Company.

Q. By whom were you employed in the lumber business?

A. For nearly three years by the Coeur d'Alene Lumber Co.

Q. What years were those?

A. From November, 1905, during 1906, 1907, until the fore part of 1908.

Q. Up to what time in 1908?

A. I don't know just exactly; along in the middle of the summer some time, I think, or along the latter part of the summer possibly.

Q. In what capacity were you employed?

A. I was wood superintendent for them.

Q. Wood superintendent?      A. Yes, sir.

Q. Did you have charge of the company's affairs there at St. Maries?

(Testimony of James C. Hunt.)

A. Under directions from the Coeur d'Alene office, excepting the logging part of it. [39]

Q. Are you familiar with the land that this accident is supposed to have happened on?

Mr. McFARLAND.—If the Court please, at this time the defendant objects to this question, and to any other or further testimony in this case, on the ground and for the reason that the complaint does not state facts sufficient to constitute a cause of action, and in particular as follows: That there is no allegation in the complaint that the premises prior to the time of the alleged drowning of these boys, or either of them, was attractive or inviting or that the defendant had impliedly or otherwise invited the boys, or either of them, upon the premises; and for the further reason that the allegations of the complaint show contributory negligence on the part of the parents of the boys, and upon the part of the boys themselves, in that it alleges that the unsafe and dangerous condition of the premises was open and notorious; and for the further reason that the complaint does not allege or state any specific act of carelessness or negligence on the part of the defendant in maintaining the premises, but merely alleges as a conclusion that the defendant did negligently and carelessly allow the premises, which is alleged to have been dangerous, to remain, or maintained, rather, and kept, and there is a failure of the complaint to allege any duty owing to the plaintiffs or either of them, or to either of the boys who are alleged to have been drowned; and that the premises

(Testimony of James C. Hunt.)

were not adjacent to or on any public highway, and that no [40] public highway passed across or through the premises. We submit these matters to your Honor.

The COURT.—I have, since ruling upon the matter of filing the amended complaint, read the answer, and I think I shall permit the plaintiffs to amend, or the plaintiff in each case to amend, if he so desires, by interlining substantially this clause: “That by reason of the sawdust in the vicinity of the well, or alleged well, the premises were attractive to children.”

Mr. PLUMMER.—We will ask to do that.

The COURT.—I do that because—I speak now to the defendant—the defendant cannot be taken by surprise as to that allegation, for the reason that I find that in the answer it is alleged that piles of sawdust were left upon the premises, so that the fact is admitted that the sawdust was there. The other fact of alleging—or the other allegation to which I refer—that the sawdust was attractive, I think cannot prejudice the defendant at this time. It certainly must be prepared with its proof, so far as there is any proof upon that point.

Mr. McFARLAND.—We desire an exception.

The COURT.—Yes, you may have an exception.

Mr. PLUMMER.—We will ask them to make the amendment.

The COURT.—Yes. The objection is overruled.

Mr. McFARLAND.—We except, if the Court please.



(Testimony of James C. Hunt.)

The COURT.—Yes.

Q. (Last question read.) [41]

A. Yes.

Q. Do you know whether or not any mill was moved away from that land at any time during the time you were superintendent of the company?

A. There was not.

Q. It was still there at the end of your term, was it? A. Yes, sir.

Q. Did you dig a well there yourself on these premises?

Mr. McFARLAND.—We object to that as not being specific enough, and not confined to any particular time.

Mr. PLUMMER.—Well, I will fix the time when I get to it.

The COURT.—He may answer this question.

A. Yes, I did.

Q. When was that?

A. That was in 1908, along in the middle of the summer.

Q. Where was that, with reference to where the sawdust pile is that is now existing there?

A. Oh, it was up the valley quite a little ways, up the gulch.

Q. Fifty or sixty feet?

A. Oh, more than that—a hundred feet, probably.

Q. Do you know of another well being dug there where the sawdust is now surrounding it?

A. There was no sawdust when the place was dug.

Q. But it is now there? A. Yes.

(Testimony of James C. Hunt.)

Q. Who dug that? A. Schmidt Brothers.

Q. What individual dug it? [42]

A. I couldn't tell you.

Q. Do you know when that was done?

A. It was done about the same time that I had the one where we watered the horses dug.

Q. You saw it dug, did you?

A. No, I did not. I saw it only casually. I know they dug it to get water for their boiler.

Q. And you knew at the time that it was dug for that purpose?

A. I knew it was being dug; it was the only way they could get water; yes.

Mr. PLUMMER.—That is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. How far apart were these holes or these wells, or cisterns?

A. You mean the one I dug and the one they dug, Mr. McFarland?

Q. Yes.

A. I haven't measured it, but I should judge it was very close to a hundred feet. I haven't been there to measure it, and haven't paid any attention to it since.

Q. Which one of these holes was nearer to the city of St. Maries? A. The larger one.

Q. The one you dug?

A. No,—the other one; that is nearer to the boundary line of the town.

Q. You say Schmidt Brothers dug one of these?

(Testimony of James C. Hunt.)

A. I presume they did. They were sawing by the thousand. [43]

Mr. PLUMMER.—We object to that. It isn't proper cross-examination. It isn't responsive.

Q. Did you see them dig this hole?

A. No, I didn't.

Q. You weren't there when they dug the hole?

A. No.

Q. Then of your own knowledge you really don't know who dug the hole?

A. I don't know what people dug it, no.

Q. And you do not know who procured the hole to be dug?

A. I couldn't say that I did, otherwise than knowing who had to do it.

Q. You are simply guessing at it because they were there, is that not a fact?

A. No, it isn't a fact, because I know we didn't dig it, and they had to.

Q. Is that the only reason,—because they had to?

A. No, it isn't, because they tried to get water from the town to run their mill, and we were short of water and wouldn't sell it to them.

Mr. McFARLAND.—I ask to have that stricken out.

The COURT.—Yes.

Q. You didn't see the Schmidt Brothers, or either of them, digging the hole, and you did not hear them tell anyone else to dig it, and you did not see it dug; isn't that true? Answer the question yes or no.

The COURT.—Answer the question.

(Testimony of James C. Hunt.)

Mr. PLUMMER.—There are two questions there.

The COURT.—Well, he is an intelligent witness.

Q. (Last question read.)

WITNESS.—Your Honor, there is two ways to answer that [44] question. Now, I saw them—

The COURT.—Well, we will have one question at a time, then. Ask one question at a time.

Q. Did you really see Schmidt Brothers, or either of them, dig that hole?

A. I saw both of them digging in the hole.

Q. In the hole? A. Cleaning it out.

Q. When was that?

A. When they were enlarging it.

Q. How long after it had been dug?

A. They were constantly enlarging the hole.

Q. How long after the hole had been first dug?

A. Possibly two weeks, and maybe more.

Q. But you do not know who originally dug the hole, do you? A. No, I do not.

Q. And the Coeur d'Alene Lumber Company didn't dig that hole?

Mr. PLUMMER.—We object to that as calling for a conclusion.

Q. Who was operating the mill at that time?

Mr. PLUMMER.—Objected to as not proper cross-examination, and calling for a conclusion of the witness. I didn't ask him anything about it.

The COURT.—Sustained.

Q. You said we didn't dig the hole. Who do you mean by "we"?

A. I meant the Coeur d'Alene Lumber Company.

(Testimony of James C. Hunt.)

Mr. McFARLAND.—That is all. [45]

Redirect Examination.

(By Mr. PLUMMER.)

Q. You were there, were you not, for the purpose of looking over their work that they were doing, the Schmidt Brothers?

Mr. McFARLAND.—Objected to as leading and suggestive.

Q. What were you there for?

A. I was superintendent or general manager of their up-river business, the Coeur d'Alene Lumber Company.

Q. What do you mean by their business?

A. Logging and river driving, and seeing that the lumber was properly sawed and piled.

Q. The lumber being sawed on this ground you have reference to? A. Yes, sir.

Mr. PLUMMER.—That is all.

Recross-examination.

(By Mr. McFARLAND.)

Q. Who was sawing that lumber that was being sawed on this ground that you were looking after?

A. Schmidt Brothers.

Redirect Examination.

(By Mr. PLUMMER.)

Q. That was being sawed for the Coeur d'Alene Lumber Company, wasn't it?

Mr. McFARLAND.—I object to that.

Q. Who was it being sawed for?

A. The Coeur d'Alene Lumber Company. [46]



(Testimony of James C. Hunt.)

Recross-examination.

(By Mr. McFARLAND.)

Q. How did you know that?

A. Because I went with Mr. Carroll to Missoula to see about the contract.

Q. They were sawing this lumber there under a contract with the Coeur d'Alene Lumber Company?

A. Yes, sir.

Q. Do you know under what terms?

Mr. PLUMMER.—I object. The contract will show for itself.

The COURT.—Not quite so vigorous, gentlemen.

Mr. PLUMMER.—My objection is that it is calling for the contents of a written instrument.

The COURT.—Was this contract in writing?

A. Yes, sir.

Mr. PLUMMER.—Then I object to it on the ground stated.

The COURT.—Sustained.

Q. Do you know whose sawmill that was?

A. I couldn't positively swear to it. Presumably it was Schmidt Brothers'.

Mr. PLUMMER.—We object to that. We object to presumptions.

Q. Was it the Coeur d'Alene Lumber Company's sawmill? A. No, sir.

Mr. McFARLAND.—That is all. [47]

**[Testimony of Mrs. Clara Thompson, for Plaintiffs.]**

Mrs. CLARA THOMPSON, duly called and sworn on behalf of plaintiffs, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. What is your first name?

A. Clara Thompson.

Q. You are the wife of O. J. Thompson, the plaintiff in this case?     A. Yes, sir.

Q. And the mother of the little boy, Bernarr Thompson?     A. Yes, sir.

Q. You recall, do you, his death?     A. Yes, sir.

Q. Do you know how he died, from what cause?

A. Yes, sir.

Q. You may state it.

A. He died from drowning.

Q. In this place up on the—right in the south part of town?     A. Yes, sir.

Mr. McFARLAND.—We object.

Mr. PLUMMER.—Yes. I will change that question.

Q. How old was this boy?     A. Seven years.

Q. Seven years?     A. Yes, sir.

Q. I wish you would state to the Court and jury just what kind of a boy he was, with reference to whether he was a smart boy or a dull boy, or active and energetic.

Mr. McFARLAND.—We object to that as immaterial.

(Testimony of Mrs. Clara Thompson.)

Mr. PLUMMER.—Let me finish my question.  
[48]

Q. Please state the general characteristics of the boy, as far as you were able to observe.

Mr. McFARLAND.—We object to it as incompetent, irrelevant and immaterial, and not responsive to any issue in this case, and not in proof or support of any allegation of the complaint.

The COURT.—Overruled.

Mr. McFARLAND.—We except, if the Court please.

The COURT.—Yes.

Mr. PLUMMER.—Go ahead.

The COURT.—His physical and mental condition.

A. He was a *bring*, strong, healthy lad.

Q. What assistance, if any, was he giving his father?

Mr. McFARLAND.—We object to that, if the Court please, because the complaint does not state or allege any damage by reason of the loss of the services, companionship or company or association of the child, and it is incompetent, irrelevant and immaterial.

The COURT.—I hardly see the purpose of this. Do you mean to say that at that age the assistance was greater than the burden of sustaining him?

Mr. PLUMMER.—Yes, your Honor.

The COURT.—In other words, that he more than earned his living?

Mr. PLUMMER.—I don't know exactly about that. The evidence is offered for the purpose of

(Testimony of Mrs. Clara Thompson.)

showing that at that time he was a very substantial assistance to the business his father was carrying on at that time, that he aided him in that business. That is a general allegation of damage, and they can't object because we haven't made it more specific.

The COURT.—If you go into that you would have to [49] show what it cost to maintain him.

Mr. PLUMMER.—I don't care to do that only in a general way.

The COURT.—Then it will be immaterial, unless you go further, for the purpose of showing his net value to his father.

Mr. PLUMMER.—I believe that is impossible to figure out, if your Honor please.

The COURT.—I can't see any other purpose of the question, unless it be that. If you will explain how otherwise it would be material I will entertain any suggestion you may make, but I can't see any other purpose than that.

Mr. PLUMMER.—Of course, I don't suppose it is possible to figure out, by a parent, just what the relative proportions of the earnings are to the cost of keep, especially where the father and mother have other children, and I just wanted to show generally that he was assisting his father in his business more than ordinary children assist their fathers at that age, and just in a general way to show that he was active and energetic, and ambitious.

The COURT.—It has already been stated that he was energetic, active and healthy. The objection is sustained.

(Testimony of Mrs. Clara Thompson.)

Q. How about the boy's characteristics, with reference to being bright for his age, that is, well educated and quick to receive instruction and retain the instruction?

Mr. McFARLAND.—We object, if the Court please, as immaterial.

Mr. PLUMMER.—That simply goes to the capacity of [50] the boy, the general promise of the boy in the future.

The COURT.—Yes, if that adds anything to what she has already stated, she may answer the question.

Mr. McFARLAND.—An exception.

Q. (Last question read.)

A. He was very bright—very bright in his studies.

Q. Did you ever know of the boy going up there on these premises to play, before the day he was drowned? A. No, sir.

Q. How far do you live from the place where he was drowned, how far, about how many blocks, do you know?

A. Well, I don't know. Let me see. It must be about five or six blocks.

Mr. PLUMMER.—You may take the witness.

Mr. McFARLAND.—I think we have no questions.

**[Testimony of Mrs. May Moore, for Plaintiffs.]**

Mrs. MAY MOORE, duly called and sworn as a witness on behalf of plaintiffs, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. State your name. A. Mrs. May Moore.



(Testimony of Mrs. May Moore.)

Q. Where do you reside?

A. At Coeur d'Alene.

Q. You are the wife of the plaintiff in one of these cases, Elijah Moore?      A. Yes, sir.

Q. And the mother of the little boy?

A. Yes, sir. [51]

Q. What was the little boy's name?

A. Russell.

Q. How old was he, Mrs. Moore, at the time he died?      A. Eight years.

Q. Will you give the jury and Court any idea of his general characteristics, as to whether or not he was a bright, active, energetic boy?

A. Yes, he was.

Mr. McFARLAND.—We object to it as incompetent, irrelevant and immaterial, if the Court please.

The COURT.—Overruled.

Mr. McFARLAND.—An exception.

A. He was a very bright, energetic boy, and a very good boy, bright in school, and bright in every way.

Q. Did you ever know of him going over to this place where he was drowned?      A. No, sir.

Mr. McFARLAND.—I ask to have the answer stricken out for the purpose of objection. We object to this question as incompetent, irrelevant and immaterial, and because the complaint alleges the fact that it was open and notorious that these boys and other boys visited these premises and used them as a playground.

The COURT.—Overruled.

Mr. McFARLAND.—We except.

(Testimony of Oliver J. Thompson.)

Mr. PLUMMER.—It isn't alleged, I don't think, that it was open and notorious that the boys visited the ground—simply that it was open and notorious as to the character of the ground. That is all. [52]

**[Testimony of Oliver J. Thompson, for Plaintiffs.]**

OLIVER J. THOMPSON, duly called and sworn as a witness for the plaintiffs, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. State your name.      A. Oliver J. Thompson.

Q. You are one of the plaintiffs in this action, are you?      A. Yes, sir.

Q. This boy Bernarr Thompson who was drowned was your son, was he?      A. Yes, sir.

Q. How old was he?      A. Seven years old.

Q. Where did you and he and your wife and family live at the time of the accident?

A. St. Maries, Idaho.

Q. Are you familiar with the town?

A. Yes, sir.

Q. How long have you lived there?

A. Five years.

Q. I will show you this map and ask you if you ever saw it before, and where you got it, if you did?

A. Yes, sir.

Q. Who did you get it from?

A. Got it from the city clerk of St. Maries.

Q. State whether or not that is a fair description of the situation of the town of St. Maries and of the land upon which the boys were drowned at the time they were drowned, if you know.

(Testimony of Oliver J. Thompson.)

Mr. McFARLAND.—We object to that because the witness hasn't qualified to testify.

The COURT.—Overruled. [53]

Q. What is your answer?

A. That is the nearest correct plat of St. Maries that has been made.

Q. I didn't ask you that. Does this paper here show a fair description of the town of St. Maries?

A. Yes, sir.

Q. From you own knowledge? A. Yes, sir.

Q. Outside of what somebody else says?

A. Yes, sir.

Q. Will you describe on the map here—is this north? A. Yes.

Q. I will mark that "N," then, right there. And this is south, is it? A. Yes, sir.

Q. I will mark that "S." Please show the Court and jury, now, on this map about where this place was that the boys were drowned.

A. This is Eighth street right here, and the sawdust pile—

Q. The street marked "Eighth" street is Eighth street, is it?

A. Yes, sir, and right out at the end of Eighth street, and back here, both sides, right about there, is where the sawdust pile is.

Q. Make a cross there so that we can see it.

A. And just about that distance from the corporate limits. On the end of Eighth street there is where the sawdust pile is, and practically in the center of that sawdust pile is the well or the hole of

(Testimony of Oliver J. Thompson.)

water that the boys were drowned in.

Q. How far is it from the end of Eighth street and the city limits to where the boys were drowned?

A. It is just about, as near as I can guess, between 275 and 300 feet. [54]

Q. What is this over here, marked A, B, C and D, just to the east of the cross you have made on this diagram?

A. This is the cemetery here, and I don't just understand what this other is, but the cemetery is right here east of the cross.

Q. State what the fact is with reference to any houses being built up west of the cross that you have made, where it isn't platted on this map.

A. There is no houses, or wasn't at the time, up in there. There is houses along here, and houses along here.

Q. When you say "along here" you are describing—

A. Right directly north.

Q. The first row of blocks directly north of the cross you have made?

A. Yes, sir—houses clear up here, up to the cemetery, houses up around here, above the cemetery.

Mr. PLUMMER.—I will offer the plat in evidence, if the Court please.

Mr. McFARLAND.—We object to it as incompetent, irrelevant and immaterial, and not properly proven, and proper foundation has not been laid for its admission.

The COURT.—Overruled.

(Testimony of Oliver J. Thompson.)

(Said plat was thereupon marked Plaintiffs' Exhibit No. 1.)

Q. Do you know now how close to this place where the boys were drowned the houses of the town were situated? Make it as general as you can, without going into detail as to each particular house.

A. Well, there is houses on the first lot of one of the blocks north of the sawdust pile, there is a house on—

Mr. McFARLAND.—If the Court please, we think this [55] witness should be confined to the time of the alleged drowning.

The COURT.—Yes.

Q. July of 1911.

A. Yes, sir. There is a house on the second lot, I believe it is, on the other block directly north of the sawdust pile, and there is other houses on the other blocks north and south of those two.

Q. You were there, were you, when the boys were taken out of the water?

A. No, sir, not when they were taken out.

Q. Shortly after? A. Shortly after.

Q. How long after?

A. I should judge about an hour.

Q. About an hour? A. Yes, sir.

Q. Did you see where they had been drowned?

Mr. McFARLAND.—I object to that, if the Court please.

The COURT.—Sustained.

Q. Did you see the sawdust pile there?

A. I did.



(Testimony of Oliver J. Thompson.)

Q. Describe the condition that was in.

A. Well, it was a very big pile of sawdust on the north side of the hole, not quite so large around on the east side and around the south side, but it was higher, some several feet higher than the water.

Q. What was the fact with reference to the sawdust being scattered and leveled off there?

A. There is a big area there covered with sawdust that has been scattered. [56]

Q. What was the appearance of the sawdust piles with reference to children having been playing there?

Mr. McFARLAND.—We object to it unless the witness shows knowledge and qualifies.

The COURT.—Well, it calls for a conclusion.

Q. Just describe the situation there with reference to any evidence, or anything that might indicate that children did use it for a playground?

Mr. McFARLAND.—Objected to.

The COURT.—Sustained.

Q. What was the condition of the sawdust pile there?

A. There was holes dug in the sides of the pile where the boys had been there playing, digging out caves, and playing, and slides where they had slid down from top to bottom, and the general appearance showed that it had been used for playgrounds.

Mr. McFARLAND.—We object, and ask to have the answer stricken out as a conclusion.

Mr. PLUMMER.—We consent, but it is pretty technical.

(Testimony of Oliver J. Thompson.)

The COURT.—Oh, no; counsel shouldn't state that it is technical.

Q. Where were the boys when you got there?

A. They were just at the edge of the water.

Q. What was the condition of the water that you saw there?

Mr. McFARLAND.—We object to that, if the Court please, as immaterial, irrelevant and incompetent, and not alleged in the complaint, and immaterial to the issues?

The COURT.—Overruled.

Mr. McFARLAND.—We except.

Mr. PLUMMER.—Answer the question. Did you hear the [57] question?

WITNESS.—I don't believe I just understand the question.

Q. What condition was the water in? Was it clear water, or dirty water, or what was it?

A. It was not clear water.

Q. How deep could you see down in the water?

A. Not very deep. The sawdust went down into the sides of the water, and you could possibly see in maybe two feet from the edge of the water.

Q. How deep could you see in the water?

A. Probably a foot.

Q. How wide and how long was this water, this body of water?

A. Well, it was about, I should judge about eight feet wide and probably twice that long.

Q. Did you ascertain at that time whether or not there was a well there? A. I did.

(Testimony of Oliver J. Thompson.)

Q. Just describe what kind of a well was there, and all about it.

A. Well, I was up there a day or two after the accident happened, and *I taken* a long piece of board and I measured in there, felt in to see how deep it was.

Q. How deep was it?

A. As far as I could figure, it was something like six or eight feet.

Q. Do you know how wide the well itself was in diameter, outside of the body of water that had overflowed, I mean the well itself, proper?

A. It didn't seem to be more than five or six feet across, the deep part. [58]

Q. Had you ever known your boy to go up there and play before? A. No, sir.

Mr. McFARLAND.—We object to that for the reason that the witness, as plaintiff, has verified the complaint, and in that complaint he stated that his boy and these boys habitually went upon these premises, and that it was open and notorious that they went thereon.

Mr. PLUMMER.—If your Honor please, that question has been raised a number of times. It is evident from the allegations of the complaint that the allegations as to being open and notorious was solely for the purpose of charging the owner defendant with knowledge of the situation there. He doesn't say in the complaint that at the time of the accident, or before the accident occurred, that he knew about it, or that he knew the boys went up there

(Testimony of Oliver J. Thompson.)

at all, but we can find those things out afterwards. They might have gone there, which I don't think they did as a matter of fact, and it is an error probably of mine, putting that point in the complaint.

The COURT.—If it was open and notorious for the defendant, why wouldn't it be open and notorious for the plaintiffs?

Mr. PLUMMER.—Because the plaintiff is not the owner of the land, and lives a long ways from it, and the same knowledge wouldn't be charged to the plaintiff as to the defendant.

The COURT.—It doesn't appear that he lived a long ways from it yet.

Mr. PLUMMER.—I think Mrs. Thompson said about six blocks. [59]

Q. How far do you live from this place, Mr. Thompson, where the boys were drowned?

Mr. McFARLAND.—At that time.

Q. Yes, at that time.

A. I live just about six blocks and a half.

Q. When was the first time that you discovered this well and this water here that you speak of?

A. When I went there—

Mr. McFARLAND.—Wait a minute. We object to that for the reason that the complaint, which is sworn to by this plaintiff, alleges that these conditions existed openly and notoriously for a long time, and he would not be permitted to contradict the allegations of his complaint, to which he has sworn.

Mr. PLUMMER.—If your Honor please, the words "open and notorious" do not mean that the

(Testimony of Oliver J. Thompson.)

whole world knows of a thing; it means that those in the immediate vicinity, or the owner, would know it. Certainly that complaint could not be construed as meaning that he himself knew it, the plaintiff, and if it does I would ask to strike that part of the complaint out, because it isn't true, and it wasn't intended to be understood that way.

The COURT.—The difficulty about it, Mr. Plummer, is that you come up here before the trial, and now during the trial—before the trial you asked to substitute an amended complaint; in other words, you ask to amend, or to be relieved from a statement in the complaint, and if the Court complies with your request it leaves the defendant without an opportunity of proving the fact that you knew of this condition.

Mr. PLUMMER.—If the Court please, they have alleged [60] it as an affirmative defense.

The COURT.—What?

Mr. PLUMMER.—That he knew about this, knew the children went there, and therefore assumed the risk. It goes to show that they didn't construe the complaint as alleging that at all, and of course they didn't.

The COURT.—I have been unable to see how I could fairly construe that complaint without construing it as implying at least that everybody in that neighborhood knew these conditions, that it was notorious.

Mr. PLUMMER.—In the immediate vicinity.

The COURT.—Well, five or six blocks would seem



(Testimony of Oliver J. Thompson.)

to be in the immediate neighborhood.

Mr. PLUMMER.—Well, five or six blocks in the city, you know, they might not know anything about it unless they happened to be there for some purpose. Here is their affirmative defense: “That at all of the times mentioned in said complaint and herein mentioned, plaintiff knew of the existence of said pond or sink, and knew that said Bernarr Thompson was in the habit of going upon said premises and that it was the duty of plaintiff to exercise care, control and supervision over him, the said Bernarr Thompson, and to prevent and restrain him from entering said premises, and from going near, in or about said pond, but that plaintiff, disregarding his duty in the premises, carelessly, negligently and knowingly permitted the said Bernarr Thompson to frequent said premises and to go in wading in said pond, and carelessly and negligently omitted to prevent and restrain the said Bernarr Thompson from entering said premises and going wading in said pond, by reason whereof the said Bernarr Thompson did, as aforesaid, enter said premises and go into said pond to wade and became [61] drowned, as aforesaid.” They allege that as an affirmative defense.

The COURT.—They would have to allege it as making part of their affirmative defense of contributory negligence.

Mr. HEITMAN.—If the Court please, the complaint first alleges the dangerous condition of the premises, and the danger of small children (paragraph 8) falling in the said well or cistern and be-

(Testimony of Oliver J. Thompson.)

coming drowned, and the habitual use of said premises by said Bernarr Thompson and other companions and children of tender years was open and notorious up to the time of the death of said Bernarr Thompson. That would extend it to anybody in the immediate neighborhood. "And was well known to said defendant, but on account of the tender years of said Bernarr Thompson he did not know or appreciate the dangerous condition of said premises." The only proper construction which can be placed upon that language, if the Court please, is that everybody in that immediate neighborhood except this boy knew and appreciated the dangerous character of the premises and the habitual use of them by this boy and his associates. Of course in setting up our defense of contributory negligence we had to make this a part of the affirmative defense.

Mr. PLUMMER.—If the Court please, as to what should be considered in the immediate vicinity there certainly seems to be a question of fact. A person might not know of something that happened even a block away, and still those right around there could see children go on this land and play from time to time, [62] day in and day out, and these people lived six blocks away. It couldn't, as I said before, possibly be construed as charging anything more than charging the defendant itself with knowledge of the conditions.

The COURT.—You expressly charge that; you say that the defendant knew this?

Mr. PLUMMER.—Yes, following that allegation

(Testimony of Oliver J. Thompson.)

of the notorious character, and for that reason, of course, he knew it. We can't bring home actual knowledge that somebody told him of it.

The COURT.—You so alleged. You allege that he knew?

Mr. PLUMMER.—If your Honor please, the law is, and I think counsel will agree with me, and also your Honor, that knowledge can be shown in two ways, either by actual knowledge, actual notification, or a condition of affairs which the law, by reason of the existence of which, the law charges notice.

The COURT.—True.

Mr. PLUMMER.—We couldn't prove, of course. We wouldn't know that the Coeur d'Alene Lumber Company had been informed by some particular person going and telling them about the dangerous condition that was left to exist there for three or four years because they had moved the plant away, and the Coeur d'Alene Lumber Company was doing business in Coeur d'Alene; therefore we charge in the complaint a condition which in law would charge them with notice, as a matter of law. In other words, if we show that the condition there was of such a notorious character that people living in the immediate vicinity knew the condition of affairs there, knew it was used as a playground, that by implication the [63] Coeur d'Alene Lumber Company must have known it.

Mr. HEITMAN.—Yes, and that the plaintiff knew of it too.

(Testimony of Oliver J. Thompson.)

Mr. PLUMMER.—The plaintiff not necessarily would know it.

The COURT.—Then it wouldn't make any difference whether it was notorious or not if by reason of being owner of the land they were supposed to know it?

Mr. PLUMMER.—They would be supposed to know of the well being there, the dangerous condition, and the people going there and playing.

The COURT.—They would be supposed to know that?

Mr. PLUMMER.—Certainly. I think that allegation is not necessary at all.

The COURT.—I was trying to find out what it was put in for. You say it wasn't for the purpose of admitting or stating that you knew. You say it was put in for the purpose of showing that the defendant knew. Now you say it wasn't necessary to be put in for that purpose.

Mr. PLUMMER.—I don't think it was, but it was put in in the exercise of an abundance of precaution in pleading, if your Honor please. Some authorities hold that the mere possession is not sufficient, but others hold that it is. But all authorities hold that where it is open and notorious they are charged by operation of law with knowledge. That was the reason it was put in there. The open and notorious character certainly couldn't charge the plaintiff in this case at all.

The COURT.—If it was open and notorious that this condition existed, and it was open and notorious



(Testimony of Oliver J. Thompson.)

that this witness' child and other children played there [64] habitually from day to day, would I be justified in submitting to the jury the question as to whether or not that wasn't constructive knowledge to the defendant, and take away from them the question as to whether or not it was constructive knowledge to the plaintiff?

Mr. PLUMMER.—If the Court please, I see the Court's position, but here is the position that we take, that even if he didn't know at the time of filing the complaint, if he did know—

The COURT.—He doesn't say that. He doesn't say that it was notoriously known at the time he filed the complaint. The notoriously known refers to the time of the accident.

Mr. PLUMMER.—Even if he did know that his child played there, and children generally played there, he could not have known of the dangerous character of the premises covered up in a way; he couldn't have known that, because the children themselves didn't know it, and they played right around there.

The COURT.—Why is this question material at this time anyway?

Mr. PLUMMER.—I don't think it is, only counsel contend for everything, and I want to cover every possible ground. I don't think it is material, because the assumption of risk is a defense anyway. I will withdraw the question temporarily.

Q. How large a town is St. Maries at this time?

Mr. McFARLAND.—We object to that as not material.



(Testimony of Oliver J. Thompson.)

Q. At that time, at the time of the accident.

The COURT.—The objection is overruled.

Q. Approximately. I don't suppose you have counted them all. [65]

A. How large at this time?

Q. No—how large at the time of the accident, in 1911?

The COURT.—Two years ago.

A. You mean the population?

Q. Yes.

A. Well, it was probably 1500, as near as I know.

Q. What was your business at that time?

A. Well, right at the time the accident happened I didn't have any business; I wasn't able to work.

Q. What had been your business when you were able to work?

A. I had been selling the "Spokesman Review" there, delivering the paper around town. I wasn't the agent, but then I was doing the work for the agent.

Q. Just describe about this boy, with reference to his general characteristics and his ambition, so far as you were able to observe.

Mr. McFARLAND.—We object to that as incompetent, irrelevant and immaterial, and tending to elicit the opinion and conclusion of the witness as to the characteristics.

The COURT.—You may state his physical and mental characteristics, his disposition.

A. Well, he was a very bright boy. He was about as near physically perfect as any child I ever saw,

(Testimony of Oliver J. Thompson.)

and upright; he was polite and nice to everybody, and everybody had a kind word for him. It seemed to affect everybody more or less around there—

Mr. McFARLAND.—We object.

The COURT.—No.

Mr. PLUMMER.—You needn't go into that part of it. You may take the witness. I may recall him later, but you may take him now. [66]

Cross-examination.

(By Mr. McFARLAND.)

Q. At the time that you found these boys up there at this pool, or whatever it was, did the bodies have their clothing on? A. No, sir.

Mr. McFARLAND.—That is all.

Redirect Examination.

(By Mr. PLUMMER.)

Q. Did your boy swim? A. No, sir.

Mr. PLUMMER.—That is all.

**[Testimony of Andrew Warner, for Plaintiffs.]**

ANDREW WARNER, called and sworn as a witness on behalf of plaintiffs, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. Please state your name.

A. My name is Andrew Warner.

Q. What is your profession, Mr. Warner?

A. I am a Methodist minister.

Q. A minister of the gospel, are you?

A. Yes, sir.

Q. Where do you reside?

(Testimony of Andrew Warner.)

A. Walla Walla, Washington.

Q. You have been subpoenaed here by the defendant also, haven't you?

Mr. McFARLAND.—We object to it as immaterial.

The COURT.—Yes.

Mr. PLUMMER.—All right. [67]

Q. Where did you reside in 1911—June, 1911?

A. St. Maries, Idaho.

Q. Have you a son? A. I have two.

Q. What is the age of the son you have with you?

A. He is nine.

Q. What is his name? A. Kenneth.

Q. Were you present shortly after the drowning of these two boys, the Moore boy and the Thompson boy, at St. Maries, on June 1, 1911? A. Yes, sir.

Q. Just state the circumstances, how you happened to go down there to where they were drowned, and what you saw when you got there. Just tell it in your own way so that the Court and jury can understand.

A. In the morning of this day the boys, having been playing lumber-jack and cowboy, decided that they would be real lumber-jacks and cowboys and go out on the hill back of the church, take their dinners with them and their blankets with them for tents, and spend the day there.

Q. Who do you mean now?

A. My boy Kenneth and these two boys that were drowned. I don't remember just the hour they went up—along about half-past ten or eleven, I think.

(Testimony of Andrew Warner.)

We thought it was perfectly safe for them to go up in this direction, being back of the church and away from the river and the roads. And about one o'clock, I think it was, my boy came rushing toward the house and run in the door and cried out that the two boys—

Mr. McFARLAND.—We object to what he said.

Mr. PLUMMER.—It is part of the *res gestae*, if the [68] Court please.

Mr. McFARLAND.—I don't think that rule applies to cases of this kind. And the question tends to elicit secondary and hearsay evidence.

The COURT.—How far is your place from the sawdust pile?

A. I judge about 200 yards, something like that; I am not quite sure—something like that distance.

The COURT.—He may answer.

Mr. McFARLAND.—An exception.

A. The lad said that he saw two boys drown, in a very excited manner. I said, "What is the matter, Kenneth?" and he said, "Russell and Bernarr are drowned," and I said, "Where?" and he said, "In the sawdust pile," and while I couldn't understand how they could drown in the sawdust pile I knew it was a desperate occasion, from the conduct of the lad, and ran toward the sawdust pile. After I came toward the top of the sawdust pile I saw this little pool of water, as it appeared. I said, "The boys couldn't drown there," but there was their clothing, and I ran down to the sawdust pile, and picked up a stick and thrust it in the pool, and it went down a

(Testimony of Andrew Warner.)

few inches, and I said, "The boys are trying to scare the lad and are hidden." I called them, and no response; then I thrust the stick out a little further and it went down, and I threw off my coat and waded out into the pool, and fell into this pool, and my feet touched on a limb or a log, I don't know whether it was on the bottom of the well or not, upon which I rested, and searched about with my foot until I found one body.

Q. How deep were you in right there?

A. I don't recall just how far down the log was. When I fell in I fell up to my neck, and my head was out of the water.

Q. Go ahead. [69]

A. By this time R. H. Wilcom had arrived, and I handed this body to him. He laid it down, and I found the other body and brought it up and handed it to him.

Q. At that time describe that pool of water that you took the bodies from. Just show how precipitous it was on the edge, and how the sawdust was surrounding it, and the whole general situation there, so that the Court and jury will understand it as you saw it.

Mr. McFARLAND.—That is not a proper question. It is assuming that it is precipitous.

The COURT.—You may state just what the conditions were there.

A. This pool of water, as I said a moment ago, was shallow near the edge, and I had stepped in but a short distance when I fell in. I didn't wade in, grad-



(Testimony of Andrew Warner.)

ually getting into deeper water, but fell in. Therefore the pool—of course, it was straight down, or so nearly so that it occurred to me that that was the condition that prevailed.

Q. How large a pool was this, that is, in diameter?

A. I couldn't be sure about the diameter of it. This I know, I came in from the south side, as I waded out into the pool, really from the southeast corner, or, rather, the south and east portion, and had gone but a few steps until I fell in, and I handed the bodies, as I was in the hole, I handed the bodies to R. H. Wilcom from the other side, and he was on the outside of the pool.

Q. You could reach him? A. Yes, sir.

Q. What was there there that you saw or felt that resembled a curbing of a well, wooden curbing, if anything?

Mr. McFARLAND.—We object to that because it is assuming conditions that haven't been testified to by [70] the witness.

The COURT.—He may answer.

Mr. McFARLAND.—An exception.

A. It occurred to me at the time that I had stumbled over a board that was standing edgewise. I know nothing of any other board. I didn't examine with that point in view, and made no examination. My business was to get the boys out.

Q. Where was this board, with reference to the sides of the well? A. Well, I fell in the well.

Q. When you stumbled over this board?

A. Yes, sir; at least that is the judgment that I

(Testimony of Andrew Warner.)

formed as I went into the well. The main thing in my mind, however, was to find the bodies, and not to examine the boards.

Q. From what you saw there, and from feeling around and getting the bodies out, what was the diameter of this well, as near as you could recollect?

A. Well, I couldn't recall definitely.

Q. You could give an approximate diameter.

A. Well, it wasn't— You mean now the hole, or the pool of water?

Q. The hole itself.

The COURT.—The hole, as distinguished from the pool of water.

A. I couldn't say definitely, for I touched but two sides of it, the one I fell in over, and the side out of which I lifted the boys.

Q. How far were the two sides you touched apart?

A. I couldn't see.

The COURT.—Were these opposite sides?

A. No, sir, they were adjacent sides. [71]

Q. When you attempted to get the boys out was there anything that you saw or could see that would indicate that there was a well there, excepting the pool of water of a shallow character that you have described? A. No, sir.

Q. Describe how this sawdust was situated with reference to the well, whether or not it was leveled off. Just describe it.

A. To the north side of the well there was a pile of sawdust, I can't recall just how high, but several feet high. To the south side there was something of

(Testimony of Andrew Warner.)

a pile of sawdust, although I don't recall that pile as I do the side on the north, as it was the north side out of which the children were taken, and we laid them on the edge of the sawdust pile on the north. The sawdust pile was several feet, a few feet high.

Q. How much ground did it cover, the sawdust scattered around there?

A. You mean the entire sawdust pile?

Q. Yes, everything.

A. It was quite a large area.

Q. Would you think an acre, or a half an acre?

A. I would hardly think an acre, and I don't know definitely.

Q. As big as this room?

A. Oh, yes, larger than this room, I think; at least that was the impression that I formed.

Q. How long had you lived there, Mr. Warner, prior to this accident?

A. About—I lived there at one time a year and a half, and I moved away, and was gone a year, and when this accident happened I had been living there at that time about nine months.

Q. During that time do you know when the mill was moved away?     A. Yes, sir.     [72]

Q. When was the mill moved away?

A. I don't recall. The mill was there when I went there, and I don't remember the exact date as to when it was taken away.

Q. Do you know how many years it was, what year it was in?

A. No, I can't recall. Let me see. I moved there in March.

(Testimony of Andrew Warner.)

Q. What year?

The COURT.—You mean this last time?

A. No, sir, the last time, that was when the mill was there.

Q. I want to know when the mill was moved away.

The COURT.—He says the mill was there when he came there the last time.

A. No, sir, the first time, and I think it was—I wouldn't be sure whether it was gone when I moved away or not; at this present time I can't recall.

Q. What was this land that this sawdust was on, and the sawdust pile itself, in that immediate vicinity generally used for after the mill left there, up to the time of this accident?

Mr. McFARLAND.—We object to that, if the Court please, because the witness hasn't shown any knowledge as to whether it was used at all.

Q. If you know.

The COURT.—You may state the use, if any, that was made of the land.

A. I don't remember whether the lumber was hauled off before the mill was removed or not. The lumber pile was there at the time the mill was there, and it was removed. The plot of ground adjacent to the sawdust pile was used for the storing of lumber.

Q. What I have reference to, what was it used for by the public, the children? [73]

Mr. McFARLAND.—We object to that as leading, if the Court please, and assuming that it was used by the public.

The COURT.—Overruled.



(Testimony of Andrew Warner.)

A. There was no fence around it and folks quite commonly were in that section, walking across it. It was rather used publicly. I think there was a road running about near there, perhaps through the property. I don't know that it was a public road, but there was a path that we used to go up through there going back to the hills.

Q. How close to this sawdust pile did that path or road go?

A. The one I referred to, going up the hill, was a short distance beyond the sawdust pile; I can't say just how many feet.

Q. Who did you ever see, if anyone, around there playing?

Mr. McFARLAND.—We object to that, if the Court please, as leading and suggestive.

The COURT.—Overruled. Answer the question.

Mr. McFARLAND.—An exception.

A. I don't recall any particular individuals that I saw around there. I couldn't name any persons just now, but folks were often there, that is, in passing back to the hills, as I say, we often went through that section, and a number of children lived about that section.

Q. What do you know, Mr. Warner, if anything, with reference to children playing around on this sawdust pile after the mill left, as a habitual occurrence? Tell what you know about that feature of it.

A. I don't recall any particular time that I saw children playing there, but I saw evidence of their having played there. There were pits in the sawdust



(Testimony of Andrew Warner.)

pile that I remember seeing, such as children would make.

Mr. PLUMMER.—You may take the witness.  
[74]

Cross-examination.

(By Mr. McFARLAND.)

Q. Mr. Warner, that pool was in an oblong form or shape, was it not?

A. I don't remember so much about the west side of it, or the southwest, rather, if I remember the directions right. I don't remember how far it extended in that direction.

Q. Well, it was longer than it was wide.

A. That is the impression I had.

Q. In going into the water did you approach from the side or the end of the pool?

A. Well, rather the corner.

Q. Rather a corner?      A. Yes, sir.

Q. And how many steps had you taken before you stepped into or fell into this hole you found in the pool?      A. Only a few.

Q. Would you say three or four?

A. Not more than that.

Q. Nor more than three or four?      A. No.

Q. And before getting into this hole how deep was the water?

A. I don't recall from wading in. I recall that as I put the stick down in the edge it was only a few inches deep, some perhaps six or eight or maybe ten, something like that; it wasn't deep.

Q. That pool was about ten or twelve feet wide at

(Testimony of Andrew Warner.)

that time, was it not?

A. You mean the narrower way?

Q. Yes.

A. I couldn't be definite as to its width. As I say, I [75] walked in this few steps, then I handed the bodies out on the other side. I don't know how wide the pool was just. As it occurs to me now, it doesn't occur to me that it was more than ten or twelve feet wide.

Q. And this hole was in the center of the pool, was it not, so far as the sides are concerned?

A. There was water all about it, as I recall it.

Q. Do you remember how long the pool was?

A. No, sir, I couldn't say definitely how long, because I paid little attention to the other side of it.

Q. Wasn't it as long as thirty feet?

A. I couldn't say.

Q. You wouldn't be safe in placing any estimate on it at all?     A. No, sir.

Q. When you discovered these boys did their bodies have any clothing on?     A. No, sir.

Q. You found all the clothing on the sawdust near the water?

A. I suppose it was all there; the clothing was there.

Q. Now, at that time there were not many families living in the immediate vicinity of the pool, were there?

A. Well, there were several families living near.

Q. Well, how near?     A. Nearer than we lived.

(Testimony of Andrew Warner.)

Q. About how far from the pool was the nearest family living?

A. I know where the folks lived, but I don't know just exactly how far it was. There were some folks that lived west of the sawdust pile, I think not quite so near as Mr. Burnham's folks, who lived to the north and a little east.

Q. Did the Burnham family live nearer than anyone else? [76]

A. I am not quite sure that the Burnham family lived on the corner or not; they lived in one of those houses.

Q. About how far did Burnham live from the pool?

A. I couldn't answer definitely. My guess would be 100 yards. That is just a guess. I haven't measured the distance.

Q. Now, this board or plank over which you stumbled, could you say whether it was in shallow water on the bottom of the pool?

A. No, I couldn't say definitely just how it was located. I remember stumbling over an obstruction which I took to be a plank.

Q. You do not know how long that plank was?

A. No, sir.

Q. This path about which you have testified is one that was made by the people who had operated the sawmill, when it was there?

Mr. PLUMMER.—That isn't cross-examination, if the Court please. I object to it.

The COURT.—Yes; he testified to a path.

(Testimony of Andrew Warner.)

Mr. PLUMMER.—I will withdraw the objection.

A. There was a road that went up into the hills from the sawmill, which became this trail to which I referred.

Q. How far was this road from the pool?

A. I can't be definite; it was back some little, several feet.

Q. Wasn't it a road that had been constructed and was used by the sawmill people, by Schmidt Brothers?

A. I think so.

Mr. McFARLAND.—That is all. [77]

Redirect Examination.

(By Mr. PLUMMER.)

Q. Do you know who built the road?

A. No, sir.

Q. I wish you would describe how difficult it was for a person to get out of this hole once they got into it, as you were when you fell in.

Mr. McFARLAND.—We object to it as leading and suggestive, and as assuming that it was difficult, if the Court please.

The COURT.—He may answer.

Q. Just describe it.

A. Well, I got out very readily, but it would be difficult for children to get out.

Q. Why?

Mr. McFARLAND.—We ask to have that latter part of his answer stricken out as not responsive, and as an opinion of the witness.

The COURT.—Denied.

(Testimony of Andrew Warner.)

Mr. McFARLAND.—An exception.

Q. Just describe why it would be difficult to get out of.

A. The hole was too deep for children to get out of readily, over this steeper part, this straight edge of the well, the deeper part of the hole.

Mr. PLUMMER.—I believe that is all. Send your boy in, Mr. Warner.

Mr. McFARLAND.—That is all. [78]

Mr. McFARLAND.—If the Court please, we object to the swearing of this witness until we can examine him as to his qualifications to testify as a witness in this case.

The COURT.—Well, you may ask him.

**[Testimony of Kenneth Warner, for Plaintiffs.]**

KENNETH WARNER, called as a witness, before being sworn, testified as follows, on being examined by Mr. McFarland.

Q. State your name.      A. Kenneth Warner.

Q. Where do you live?

A. 807 Whitman Street, Walla, Walla.

Q. How old are you?      A. Nine years old.

Q. Where did you live before you went to Walla Walla?      A. St. Maries.

Q. When did you go to St. Maries?

A. I don't know.

Q. When did you leave St. Maries for Walla Walla?      A. I don't remember.

Q. How many different times did you and your father live in St. Maries?      A. Twice.

Q. Do you know when you left there the first time?



(Testimony of Kenneth Warner.)

The COURT.—Well, do you mean what date?

Mr. McFARLAND.—Yes, what year, how long ago.     A. I don't know.

Q. Do you know when you went back to St. Maries?     A. No, sir.

Q. To what place did you go when you left St. Maries the first time?     A. Rathdrum. [79]

Q. And you don't know when you left Rathdrum?  
A. No.

Q. Did you ever testify in court as a witness?  
A. No.

Q. Do you know what it is to take an oath to testify in court?     A. No, sir.

Q. Do you understand the obligation of an oath, what it means to hold up your hand in court and be sworn?  
A. Yes.

Q. How?     A. Yes, sir.

Q. When did you learn that?     A. Papa told me.

Q. When did he tell you that?     A. To-day.

Q. Is that the first time you knew it?     A. Yes.

Q. What does it mean, taking an oath, or being sworn in court as a witness?

A. It means that you mustn't lie.

Q. It means what?

A. That you mustn't lie.

Q. Do you know what would be done to you, or what would become of you if you were to swear to something that wasn't true?     A. No, sir.

Q. You don't. Do you remember things that happened two years ago?     A. Yes, sir. [80]

Q. Everything that happened to you, that you

(Testimony of Kenneth Warner.)

saw?      A. No, sir.

Mr. McFARLAND.—If the Court please, we object to this boy being sworn as a witness and permitted to testify in this case, for the reason that it is shown that he is too young, and doesn't fully understand and realize the nature and obligation of an oath.

The COURT.—What is your name?    Kenneth?

A. Kenneth.

The COURT.—I will state this to you, Kenneth, that when you are sworn here to testify you must tell nothing but the truth, and if you tell a story or a lie, as you call it, you are in danger of being very severely punished. People who tell lies in court are sometimes sent to jail or the penitentiary. You may administer the oath, Mr. Clerk. Stand up, Kenneth, and hold up your hand.

(The witness, Kenneth Warner, was thereupon sworn.)

Direct Examination.

(By Mr. PLUMMER.)

Q. Now, Kenneth, there is nothing to be scared of at all. You mustn't be scared. Nobody is going to hurt you. I just want you to tell about the two boys being drowned. Were you with these two boys when they were drowned?      A. Yes, sir.

Q. That is, the Moore boy and—

A. And the Thompson.

Q. And the Thompson boy?      A. Yes, sir.

Q. Where had you and those two boys been that forenoon?      A. Been playing up on the hill. [81]

(Testimony of Kenneth Warner.)

Q. Where did you say you had been, Kenneth?

A. Up on the hill.

Q. How far from where they were drowned?

A. About a block.

Q. About a block?      A. Yes.

Q. Where did you and the boys go after you had been up on the hill?

A. Went over by the sawdust pile to play around there.

Q. Went over there to play?      A. Yes.

Q. What did you play? What did you and the boys play there?

A. We played cowboy and lumber-jack.

Q. What did you do in playing that? Did you run around, or how?

A. Ran around over the sawdust pile.

Q. Had you ever been there before yourself?

A. No, sir.

Q. What happened then after you had played cowboy and lumber-jack?      A. We ate our lunch.

Q. Where did you eat your lunch?

A. Right by the sawdust pile, on it.

Q. On the sawdust pile?      A. Yes, sir.

Q. In one of the little holes there?      A. Yes.

Q. Just describe that hole that you ate your lunch in there, what kind of a hole it was, in the sawdust?

A. It was the first place—I don't think it was a hole; it was just at first where the sawdust pile went up. [82]

Q. How far away was it from where the boys were drowned?      A. I don't know.

(Testimony of Kenneth Warner.)

Q. Then what did you and the boys do after you ate your lunch?

A. We went over to the sawdust pile and saw this pool.

Q. Over to where the water was?      A. Yes, sir.

Q. What did you and the other boys do there?

A. Waded in at first.

Q. You waded around in there, did you?

A. Yes, sir.

Q. How long did you and the other boys wade around in the water?      A. I don't know.

Q. Did you see anything there, Kenneth, to show you that there was a deep hole there?      A. No, sir.

Q. How was the water where you were wading around, how deep was it where you waded around there?      A. Just shallow, about six inches.

Q. How far did it come up on your ankles?

A. I don't know.

Q. Then what happened after you and the boys waded around a while?

A. They took off their clothes and went in swimming, was going to go in swimming.

Q. Who went in first?      A. Bernarr.

Q. Bernarr Thompson went in first?

A. Yes, sir.

Q. Then what happened to him when he went in?

A. Russell tried to help him out. [83]

Q. The Moore boy tried to help the Thompson boy out?      A. Yes.

Q. What did the Thompson boy do to cause the Moore boy to try to help him out? Was he drown-

(Testimony of Kenneth Warner.)

ing, or what?      A. He was drowning.

Q. What did he say or do?

A. I don't remember.

Q. What made you think he was drowning?

A. Because he made a motion when he was in the water.

Q. Made motions for help, did he, and then the Moore boy went in to pull him out?

A. Yes, sir.

Q. Then what became of the Moore boy?

A. He drowned with him.

Q. And then you run to tell your father, did you?

A. Yes, sir.

Mr. PLUMMER.—Take the witness.

Cross-examination.

(By Mr. McFARLAND.)

Q. Did you wade around in that place yourself, Kenneth?      A. Yes, sir.

Q. Did you take off your shoes and stockings to wade around?      A. Yes, sir.

Q. And were you wading around there after these boys had taken off their clothing?      A. No, sir.

Q. You stayed out on the bank, did you?

A. Yes, sir.

Q. Now, you say that Thompson went in first?

A. Yes, sir. [84.]

Q. Took off his clothes first?      A. Yes, sir.

Q. Did he try to swim around in there?

A. Yes, sir—no—he tried to, but he couldn't.

Q. How long had he been trying to swim before he went down?      A. I don't know.



(Testimony of Kenneth Warner.)

Q. Do you know how long a minute is?

A. Sixty seconds.

Q. Well, had he been trying to swim sixty seconds?

A. I don't know.

Q. When the Thompson boy was trying to swim, what was the Moore boy doing?

A. He was watching him.

Q. Did he have off his clothes then too?

A. Yes, sir.

Q. Was he in the water or out on the bank?

A. Out on the bank.

Q. Was he standing out on the bank at the time that the Thompson boy commenced to drown?

A. No, sir.

Q. Was he in the water at that time?

A. Yes, sir.

Q. Was he standing up or trying to swim?

A. Trying to swim. He was trying to pull him out.

Q. When the Thompson boy first began to drown, how far was the Moore boy from him?

A. I don't know.

Q. Well, was he as far as from you to me?

A. I don't think so.

Q. Was he half that far?      A. Just about.

Q. Just about. Did he have his feet on the bottom of the pool? [85]      A. I don't know.

Mr. PLUMMER.—Who do you mean—which boy?

Mr. McFARLAND.—The Moore boy.

Q. What did the Thompson boy say, if anything, when he first commenced to drown?

(Testimony of Kenneth Warner.)

A. I don't know.

Q. Did he say anything?      A. No, sir.

Q. Did he speak or holler?      A. No, sir.

Q. Or cry out in any way?      A. No, sir.

Q. Did he make any motions with his hands?

A. Yes, sir.

Q. Show the jury what kind of motions he made.

A. Waved his hands like this.

Q. Just waved his hands like this?

A. Yes, sir.

Q. Did he strike the water when he was waving his hands that way?      A. Yes, sir.

Q. Did the Moore boy say anything when he started to where the Thompson boy was?

A. I don't remember.

Q. How?      A. I don't remember.

Q. Did the Moore boy get hold of the Thompson boy, catch him with his hands in any way?

A. I don't think so.

Q. He did not. Did you see the Thompson boy when he went down under the water for the last time?      A. No, sir. [86]

Q. Had he gone under the water when you left there to go for your father?

A. I don't know; I don't remember.

Q. How?      A. I don't remember.

Q. You don't remember. Had the Thompson boy gone under the water the last time when you started for your father?      A. No, sir.

Q. Did you see the Moore boy or the Thompson boy either go under the water the last time?

(Testimony of Kenneth Warner.)

A. No, sir.

Q. You didn't see them when they were drowned then, did you?     A. No, sir.

Q. When you saw the Thompson boy waving his hands that way, did you strike out for home?

A. Yes, sir.

Q. And did you look at the Moore boy just before striking out for home?     A. No, sir.

Q. Do you know what the Moore boy was doing when you left this pool to go home for your father?

A. I don't know.

Q. You don't remember much about that, do you, Kenneth?     A. No, sir.

Q. That has been a long time ago, hasn't it?

A. Yes, sir.

Q. Do you know how long ago it was?

A. Two years.

Q. You don't know which one of these boys drowned first, do you?     A. I think Russell did.

Q. Russell who? [87]     A. Moore.

Q. Neither one of those boys could swim, could they?     A. I don't think so.

Q. Was either one of them in the middle of the pool at the time they went in, or at the time the Thompson boy began to drown?

A. No, sir, I don't think so; I can't remember.

Q. How far was the Thompson boy from the bank or edge of the pool when he began to wave his hands?

A. Pretty near in the middle.

Q. Was he as far from the bank as it is from you to me?     A. No.

(Testimony of Kenneth Warner.)

Q. It wasn't quite that far. Was it half that far?

A. Yes, sir.

Q. Now, after the Thompson boy commenced to wave his hands, did the Moore boy stand up in the water? A. No, sir.

Q. How did he start toward the Thompson boy?

A. He was in the water then.

Q. Who was? A. Russell, the Moore boy.

Q. What did he do when he saw the Thompson boy waving his hands in that manner?

A. He was under the water.

Q. Who was? A. The Moore boy.

Q. He was under it? A. Yes, sir.

Q. Was all of his body, head and all, under the water? A. I don't remember.

Q. Have you been up to that place this year?

A. No, sir. [88]

Q. You haven't been up there since you came up to Coeur d'Alene and St Maries this last time?

A. No, sir.

Q. You have been up to St. Maries, haven't you?

A. No, sir.

Q. Haven't you? A. No, sir.

Q. How long had you known these two boys before that day? A. I don't remember.

Q. Were you in the habit of playing with them much? A. Yes, sir.

Q. Did the three of you play together right along, every day most? A. Most always.

Q. Did you go to school together that year before this accident happened?

(Testimony of Kenneth Warner.)

A. I and Russell did, but—

Q. How?

A. I and Russell Moore did, but Bernarr didn't.

Q. Did you go to the school with him and back each day?     A. Yes, sir.

Q. When did your school let out?

A. I don't remember.

Q. Do you remember how long your school let out before the boys drowned?

A. Just about three or four days.

Q. Were you playing with the Moore boy and the Thompson boy those three or four days after school let out and up to the time they were drowned?

A. Yes, sir.

Q. And you had never been to that place before?  
[89]     A. I hadn't.

Q. And you had played with them almost every day before school let out, hadn't you, played with the boys, the Moore boy and the Thompson boy?

A. Some of the time.

Q. How?     A. Most always.

Q. How far did you live from the Moore boy?

A. About half a block.

Q. And how far did you live from the Thompson boy?     A. I don't remember.

Q. Did you go to the Thompson boy's home often?

A. Not very often.

Q. Did he come to your house often?

A. Quite often.

Q. And did you go to the Moore boy's house often?

A. Yes, sir.



(Testimony of Kenneth Warner.)

Q. And did he come to your house often?

A. Yes, sir.

Q. You were playing together almost all the time when you were— A. Yes, sir.

Q. —not at home in bed, weren't you?

A. Yes, sir.

Q. Did the Thompson and Moore boys go with any other boys except you when you were not along?

A. I don't know.

Q. You didn't see them with any other boys when you were not along with them?

A. I don't remember.

Mr. McFARLAND.—I think that is all, your Honor. [90]

Redirect Examination.

(By Mr. PLUMMER.)

Q. Kenneth, tell us how it was that you and the other boys went down to this place to play, what there was there to cause you to go.

Mr. McFARLAND.—I object to that, if the Court please.

Mr. PLUMMER.—To show the attractiveness of it.

Mr. McFARLAND.—If the Court please, I think counsel can elicit that testimony, if the witness is in a position to give it, by some other question—find out where they started to go when they left home, and how they came to go out to this place, and not by leading questions.

The COURT.—You may answer the question, Kenneth. How did you and these other two boys

(Testimony of Kenneth Warner.)

happen to go to this place, the sawdust pile?

A. They were both over to Moore's house, and I came over there and they asked me if I wanted to go, and I said I did, and they went.

The COURT.—Well, but you say you went to the hills first, didn't you?     A. Yes, sir.

The COURT.—After you had gone to the hills, how did you happen to go, or why did you go to the sawdust pile, do you remember?     A. No, sir.

Mr. PLUMMER.—Q. Do you remember what there was there that made you want to go there?

A. No, sir.

Mr. McFARLAND.—We object to it as an improper question. [91]

The COURT.—Well, he has answered.

Mr. PLUMMER.—That is all, Kenneth.

Recross-examination.

(By Mr. McFARLAND.)

Q. Do you know what time of day it was when you started away from home up in the hills?

A. No, sir.

Q. Was it before dinner-time?     A. Yes, sir.

Q. Noon?     A. Yes, sir.

Q. Do you know how long before noon about?

A. About half-past nine, or ten.

Q. How long did you stay up in the hills?

A. Till about—I don't remember.

Q. What did you boys do up in the hills when you got there?

A. We played up around there, and then went over to the sawdust pile.

(Testimony of Kenneth Warner.)

Q. How?

A. We played around there a while, and then went over to the sawdust pile.

Q. Did you stay up in the hills long before you went to the sawdust pile?     A. I don't remember.

Q. Did you eat any lunch up in the hills?

A. No, sir.

Q. Did you make any tents up there?

A. No, sir.

Q. Did you lay down and rest, or sit down?

A. I don't remember.

Q. Do you know how far it was up in the hills that you went [92] from this sawdust pile?

A. Just up pretty near to the graveyard.

Q. About how far from the sawdust pile?

A. I don't know.

Q. Did you stop at any other place before you reached the sawdust pile?

A. No, we just went slow, as we went along.

Q. How long had you been at the sawdust pile before you ate your lunch?     A. I don't know.

Q. And how long after you ate your lunch was it before you boys commenced to wade around in the water?     A. I don't know.

Mr. McFARLAND.—That is all.

Redirect Examination.

(By Mr. PLUMMER.)

Q. Kenneth, do you like to play in sawdust?

A. Yes, sir.

Mr. McFARLAND.—I object to that.

The COURT.—Sustained.

(Testimony of Kenneth Warner.)

Mr. PLUMMER.—That is a leading question, but this is a child, and—

The COURT.—That is one reason why you shouldn't lead him.

Mr. PLUMMER.—That is the only way I can call attention to it.

Q. Kenneth, why did you want to go down there where the [93] sawdust was to play cowboy and lumber-jack?

Mr. McFARLAND.—If the Court please, he has tried to ask that question several times, and the witness has answered it.

The COURT.—The question has been asked, and the objection is sustained.

Mr. PLUMMER.—On account of repetition?

The COURT.—On account of repetition.

Mr. PLUMMER.—That is all.

**[Testimony of George F. McClure, for Plaintiffs.]**

GEORGE F. McCLURE, duly called and sworn as a witness on behalf of plaintiffs, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. Are you a little deaf, Mr. McClure?

A. Yes.

Q. Just state your name.

A. George F. McClure.

Q. Where do you reside?      A. St. Maries, Idaho.

Q. How long have you resided there?

A. Seven years this fall.

Q. Were you residing there in 1908?

(Testimony of George F. McClure.)

A. When?

Q. 1907 and 1908?      A. Yes.

Q. Who did you work for there that was engaged in the lumber business? Who did you work for?

Mr. McFARLAND.—We object to that. [94]

Mr. PLUMMER.—I will withdraw it, then.

Q. Did you do any work in digging any wells for anybody.      A. Yes.

Q. Who for?      A. Schmidt Brothers.

Q. What were they doing there?

A. They were sawing logs.

Q. Do you know where these boys were drowned, where they are supposed to have drowned?

A. I suppose from what I hear that they was in that place, you know. Of course, I didn't—

Q. Do you know of a sawdust pile just outside the city limits, south of the city?      A. Yes sir.

Q. Just the extension of Eighth street, or about there?      A. What?

Q. Just at the extension or prolongation of Eighth street, or about there?      A. I think it was.

Q. This is south (showing witness map) and that is north, and this is the town of St. Maries, and here is Eighth avenue, on this map. About where this cross is marked there, do you recall—

A. That is pretty close to it.

Q. Did you dig a well there where the sawdust is now surrounding the place?      A. Yes, sir.

Q. How deep did you dig that well?

A. Well, somewheres about eight or nine feet, I should judge.



(Testimony of George F. McClure.)

Q. Do you know how far that hole was from the end of the nearest street there in St. Maries?

Mr. PLUMMER.—We object to it for the reason that it is not proper cross-examination. [97]

Mr. McFARLAND.—He asked him the same question himself, pointed it out on the map.

The COURT.—He may answer.

Mr. PLUMMER.—I will withdraw the objection.

Q. (Last question read).

A. No, I couldn't tell you just how it was, because I never measured it.

Q. It was about 300 yards, wasn't it?

A. I couldn't say.

Q. Can you say about how far, to be on the safe side?

A. I should think it would be somewhere in the neighborhood of a block, or two, something like that.

Q. Now, there was a little valley up above this hole, was there not? A. How?

Q. A little valley above this hole?

A. Which way?

Q. Why, right above it. I believe it would be south. A. There had been a clearing in there.

Q. Wasn't there a little stream that trickled down the valley and into this hole?

Mr. PLUMMER.—We object to it as not proper cross-examination.

Mr. McFARLAND.—It is preliminary.

The COURT.—Oh, yes; I can't see that it would do any harm. He may answer.

Q. (Last question read.)

(Testimony of George F. McClure.)

A. Well, there might have been in wet weather.

Mr. McFARLAND.—That is all. [98]

Redirect Examination.

(By Mr. PLUMMER.)

Q. Do you know when Schmidt Brothers, or the people that were operating the mill there, the actual operators, do you know when they left?

A. I didn't quite understand what you said.

Q. Do you know when the mill was moved away?

A. Well, no, I couldn't say for sure when they did move.

Q. How long after you dug this well, about how long?

A. Oh, it must have been a year or so, I should judge, perhaps longer, but somewheres about then.

Mr. PLUMMER.—That is all.

Mr. McFARLAND.—That is all.

[**Testimony of Frank B. Jones, for Plaintiffs.**]

FRANK B. JONES, duly called and sworn as a witness on behalf of plaintiffs, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. Where do you live, Mr. Jones?

A. St. Maries.

Q. Do you recall the drowning of the Moore boy and the Thompson boy two years ago?

A. Yes, sir.

Q. How far do you live from where they were drowned?

(Testimony of Frank B. Jones.)

A. Well, I live about 300 yards, I should judge, guessing at it.

Q. Do you recall the time the mill was moved off, where the sawdust pile is there?

A. Yes, sir. [99]

Q. When was that?

A. What year, do you mean?

Q. Yes, just what year. I don't care anything about the month.

A. Well, sir, I don't believe I could answer that. I don't believe I could. I don't know that I remember when they did move that mill.

Q. About how many years before these boys were drowned, as near as you remember now. It isn't very important.

A. It must have been moved a couple of years, or three, before then.

Q. Two or three years, to the best of your recollection?

A. Yes, sir, I think so.

Q. From the time the mill was moved away until these two boys were drowned, just tell what you know with reference to this ground being used as a playground for children.

Mr. McFARLAND.—We object to that as leading and suggestive, and assuming that it had been used as a playground, and not within the issues, and not alleged.

The COURT.—Overruled. Answer the question.

Q. Go ahead and tell what you know about it.

A. Well, sir, I was watching fire down there on that sawdust pile for the Coeur d'Alene people, and

(Testimony of Frank B. Jones.)

in watching the fire there was more or less boys that played there around the sawdust pile and on those grounds, and I also worked there in the cemetery, and I often saw boys playing there.

Q. About how many would you see there at different times, just your recollection?

A. Oh, there would sometimes be half a dozen, sometimes more, and sometimes less.

Q. How long were you watching the fire for the Coeur d'Alene Lumber Company? [100]

A. Well, sir, I don't just exactly know, but between two and three weeks, twelve or fifteen days.

Q. What fire was that?

A. That was after the big fire, the forest fire, in 1910.

Q. Was this sawdust pile on fire? A. Yes, sir.

Q. Were you watching that for the company?

A. Yes, sir.

Q. How often, as near as you can recollect without specifying any dates, about how often was this sawdust pile used there by these children in playing around there? What I want to get at, was it once a month, once a week, or once a day?

A. Oh, they would play there off and on; you would see them there every day perhaps, and then perhaps there would be a vacancy they wouldn't be there; they would be there more or less.

Q. What is the fact with reference to that condition existing between those times that mill was moved away and the time these boys were drowned?

A. I just don't understand.

(Testimony of Frank B. Jones.)

Q. Did that cover the whole period of time between the time the mill was moved away?     A. Yes, sir.

Q. And the time the boys were drowned?

A. Yes, sir.

Q. Did you ever stick a board down in the well there, one of those wells, to see how deep it was?

A. Yes, sir.

Q. When was that?

A. That was when I was watching this fire.

Q. How deep was it there?

A. Well, I wouldn't say just, but I was getting water out [101] of this hole to put out fire, and I came very near slipping in there one day, and thinks I, "I will see how deep it is," and I found a little edging or piece of board there, and I would get out and try to sound it, and it would go about so far, and of course this lath or edging would come back, and I don't know just how far—

Q. You couldn't reach the bottom?     A. No, sir.

Q. How long was this stick you had?

A. I should think it was six or eight or ten feet.

Q. What was the condition of this hole here with reference to the edge of the water? Just describe it, if you can.

A. When I was there the sawdust had got down there, and there was practically no water at all, because the sawdust covered the water to a great extent. There was some water, of course; you could dip down through the sawdust and dip water.

Q. The sawdust went clear down as far as you could see in the water, did it?



(Testimony of Frank B. Jones.)

A. Yes, sir; there was a little place, of course, in the center where you could see water.

Q. Could you see bottom at all there anywhere?

A. No, sir.

Q. From what you saw there comparatively what was the width of the well part of it there, the diameter across, just the well part itself?

A. It was awful narrow; it wasn't, I should judge, more than four or five feet wide, that is, taking in this sawdust and what little water I could see, and perhaps six or seven feet long.

Mr. PLUMMER.—You can take the witness.  
[102]

Cross-examination.

(By Mr. McFARLAND.)

Q. When were you working in the cemetery there, what year?     A. In 1910.

Q. What month?

A. Well, I worked there off and on for the whole year.

Q. Were you there every month of the year during 1910?

A. No, I don't know as I was, every month.

Q. Were you there every day in any one month?

A. No, sir, I don't know as I was there.

Q. How many days on an average did you work there a month?

A. Well, I was opening and closing graves there for Mr. Mulcahay, and whenever there was a funeral I opened the grave.

Q. You were only there when there was a funeral?

(Testimony of Frank B. Jones.)

A. I tended some lots there, yes; there was some lots I kept up.

Q. How much time did you spend altogether in the year 1910 in working in that cemetery?

A. I couldn't say as to that.

Q. Did you spend as much as two weeks altogether?     A. Yes, sir.

Q. Three weeks?

A. I might possibly have spent three weeks, that is, keeping the lots and opening the graves, and such as that.

Q. But not more than that time?

A. No, I don't know as I did.

Q. How far is that cemetery from this water?

A. The cemetery?

Q. Yes?

A. Well, it is fifty or sixty yards, I should think.

[103]

Q. Isn't it more than that?

A. No, I don't think it is.

Q. Isn't it a couple of hundred yards?

A. No, sir.

Q. Isn't it more than a hundred yards?

A. No, sir.

Q. What time in 1910 was this fire you mentioned?

A. What time of the year?

Q. Yes.

A. I think the fire was in August; it was right after that forest fire.

Q. How long did you watch there for the Coeur d'Alene Lumber Company?

A. I don't just know, but I was there, it seems to

(Testimony of Frank B. Jones.)

me, about three weeks.

Q. Were you employed for that purpose?

A. Yes, sir.

Q. Didn't do anything else?      A. No, sir.

Q. Do you know how long they paid you for working?

A. I did at the time, but I have forgotten.

Q. Was it as long as two weeks?      A. Yes, sir.

Q. When you first commenced to watch the fire had it extended to the sawdust pile?      A. Yes, sir.

Q. The sawdust pile was then on fire?

A. Yes, sir.

Q. And remained on fire for three weeks?

A. Yes, and longer than that.

Q. And it spread pretty much all over the sawdust there, didn't it? [104]

A. It did in places, yes.

Q. It reached nearly every part of all the sawdust around that pool?

A. Around the edges. Over the top of the sawdust it didn't; it worked around it.

Q. Didn't it reach on top in some places?

A. Once in a while it would run up on the edge, yes.

Q. And you threw water on it, did you?

A. Yes, sir.

Q. Did you throw water all over that sawdust?

A. No, not all over it.

Q. After you quit there in 1910 that sawdust pile was pretty well blackened and rotten, wasn't it?

A. Well, yes.

(Testimony of Frank B. Jones.)

Q. How?      A. Yes, it was.

Q. Showed evidence of having been burnt pretty badly?

A. Around the edges it did, and the fire undermined it, went in under, underneath.

Q. And it showed quite a condition of decay too, didn't it?

A. Some of it was older than others; some of it was new sawdust and some was old.

Q. During the time the sawdust pile was on fire the boys didn't play there, did they?

A. Yes, sir.

Q. Where did they play?

A. They played all around there, and I forbid them; I told them it was working underneath, and I said it was undermining it, and I drove them away.

Q. How many times did you drive them away?

A. Half a dozen times. [105]

Q. Did they still come back?      A. Yes, sir.

Q. Did you tell any of their parents about their coming there?

A. No, sir; I simply told them it was dangerous and they oughtn't to be playing there.

Q. On account of these holes in the sawdust?

A. Yes, and the fire.

Q. And you told them that every time they came?

A. Yes, sir, I told them they oughtn't to be playing around that sawdust pile.

Q. Now, after the year 1910 you didn't visit that place often, did you, that sawdust pile?

A. No, sir, after I quit watching I didn't.

(Testimony of Frank B. Jones.)

Q. You didn't go up there at all, did you?

A. Yes, I generally go down through there when I go down town, because it is nearer for me to go there.

Mr. McFARLAND.—That's all.

Redirect Examination.

(By Mr. PLUMMER.)

Q. Have you any children?      A. Yes, sir.

Q. What is the fact, before you found the depth of this hole that you have described by putting a stick down, what do you know about your own children playing in there before that time?

Mr. McFARLAND.—We object to that as irrelevant, incompetent and immaterial, and not binding upon the defendant.

The COURT.—Sustained.

Q. Counsel asked you with reference to driving the children [106] away and warning them about the danger.      A. Yes, sir.

Q. What danger did you warn them of?

Mr. McFARLAND.—We object to it because the witness has already answered, on account of the fire and on account of the undermining of the sawdust, and the holes in it.

Mr. PLUMMER.—I thought he had reference to these holes these boys fell in.

Mr. McFARLAND.—Oh, no.

Mr. PLUMMER.—All right; with that understanding it is all right. That's all.

The COURT.—Gentlemen of the jury, you will



(Testimony of Frank B. Jones.)

return into court to-morrow morning at nine o'clock, and in the interval be very careful to avoid discussing any matter connected with this case with any person, or permitting any person to discuss it in your hearing; also avoid discussion among yourselves, and reserve your judgment until the case is finally submitted to you.

An adjournment was accordingly taken until 9 A. M., Saturday, June 7, 1913. [107]

At 9 A. M., Saturday, June 7, 1913, the Court resumed its session, pursuant to adjournment.

Mr. PLUMMER.—We will call Mr. Howard.

Mr. McFARLAND.—We would like to recall Mr. Jones for the purpose of a few questions on cross-examination some time before the plaintiff closes its case.

The COURT.—Is he here?

Mr. PLUMMER.—I think he is here. You don't want to do it right now, do you?

Mr. McFARLAND.—No, I am not particular about the time.

**[Testimony of Adam Howard, for Plaintiffs.]**

ADAM HOWARD, duly called and sworn as a witness on behalf of plaintiffs, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. What is your full name?      A. Adam Howard.

Q. Where do you reside?      A. St. Maries.

Q. What is your business?

A. Farming and gardening.

(Testimony of Adam Howard.)

Q. How close is your place to St. Maries?

A. To this place? To St. Maries?

Q. Well, yes, to this place in question here, the place where the boys were drowned?

A. Somewhere in the neighborhood of 250 yards.

Q. How long did you live in the vicinity there of St. Maries, and on your place, before the boys were drowned?

A. From the last days in March until the accident occurred.

Q. And during that time, did you have an opportunity to see [108] what condition the premises were in there, and what it was used for by children, if anything?

A. Well, yes, I have noticed children there quite frequently.

Q. What were they doing when you saw them?

A. Some of them were playing, and I had a couple of children there that were herding cows there.

Q. Was that where you usually herded your cows?

A. Yes.

Q. Did that condition exist during all the time you lived there that you speak of, from March until the boys were drowned?

Mr. McFARLAND.—We object to that as leading.

The COURT.—Sustained.

Q. How long did this condition exist that you speak of that children were playing there and herding cattle around there?

A. Well, my children herded cattle there that sea-

(Testimony of Adam Howard.)

son and last year, and they haven't herded any this year.

Q. I am speaking now of the time between when you moved there and the time the boys were drowned.

A. We didn't start in to herd before May, possibly a month or such a matter.

Q. With reference to the other children playing around there in the sawdust pile, not your own children, how long a time did that continue, how many months?

Mr. McFARLAND.—If the Court please, the witness didn't say they played in the sawdust pile.

Q. Where were these children playing that you saw playing there?

A. Over the ground there. There is quite a nice open scope of country there, and they were playing around the sawdust pile, and on that open grass plot there. [109]

Q. About how frequently from the time that you went there until these boys were drowned, how frequently did you see children playing in the sawdust pile around there?

A. Well, that would be pretty hard for me to answer that.

Q. Come as near as you can to it.

A. Of course there was hardly a day passed but what there was some around. Of course I was busy a good deal of the time; I probably didn't notice every day; I didn't think anything about the matter.

(Testimony of Adam Howard.)

Q. Did you ever notice this place where the boys were drowned?

A. Why, I have been there around it, yes.

Q. Before they were drowned?

A. Yes, sir, and since then.

Q. Was there anything there to indicate a deep hole or well?

Mr. McFARLAND.—I object to that; the witness hasn't shown that he knows.

The COURT.—Overruled.

Q. That you could see before this accident happened?

A. Why, no; there was a little puddle of water there; that was all that was noticeable.

Mr. PLUMMER.—You can take the witness.

Cross-examination.

(By Mr. McFARLAND.)

Q. Mr. Howard, you say you lived about 300 yards from that sawdust pile?

A. Yes; a little less than that.

Q. And for how long did you live there up to the time of the accident?      A. How long?

Q. Yes. [110]

A. From the last days of March, the 28th or 9th, until this occurred.

Q. Was your house in sight of this sawdust pile?

A. Yes.

Q. Was the sawdust pile in sight of your house?

A. Yes, sir.

Q. What business were you engaged in during that time?

(Testimony of Adam Howard.)

A. I was gardening, and the land that I gardened laid closer to the sawdust pile, with the slope toward the sawdust pile.

Q. For whom were you gardening?

A. For myself.

Q. How much land were you gardening?

A. Maybe I had two and a half acres.

Q. Were you engaged there all the time?

A. Not all the time; no.

Q. Were you down there frequently?

A. Well, occasionally, when I had business.

Q. Did you work at any other work between the latter part of March and the first of June that year?

A. Yes, I worked at other work.

Q. What kind of work did you do?

A. Plowing gardens around over the town.

Q. At different places in the town?     A. Sure.

Q. And during those times you were not in sight of this pile of sawdust?

A. Mornings and evenings I was, and noons.

Q. Your boys didn't herd cattle on this sawdust pile, did they?     A. Well, around there. [111]

Q. Didn't they herd up the valley further up, where there is grass?

A. The best grass is right around there pretty close to that sawdust.

Q. Right around there?     A. Pretty close; yes.

Q. What do you call close?

A. Well, within twenty yards of it, from there probably to a hundred and fifty or two hundred yards.



(Testimony of Adam Howard.)

Q. Do you mean to tell the jury that your boys herded cattle within twenty yards of that sawdust pile from the last of March to the first of June?

A. No, sir, I didn't state that; I said from the time grass come.

Q. Weren't they up in the hills, and further up the valley a great deal of the time?

A. They were up and down the road there somewhat.

Q. How old were your boys, and how many were there?

A. There was only one boy, and a girl; there was two of them.

Q. How old were they?

A. They are twelve years old now.

Q. You say you are pretty familiar with the surroundings there?     A. Pretty much so; yes.

Q. What was the condition of that sawdust pile there at that time?

A. When we first come there it was burning a good deal of the time.

Q. And it was blackened up and decayed, wasn't it?     A. Somewhat, yes.

Q. And around that pool was a dumping ground for the people around there, wasn't it? [112]

A. Dumping garbage?

Q. Yes, dumping garbage.

A. Well, not close in to the pool.

Q. Isn't it a fact that right around the edges of the pool there was manure dumped, and old cans, and

(Testimony of Adam Howard.)

rubbish, and things of that kind, and even on the sawdust pile?

Mr. PLUMMER.—We would like to ask, if your Honor please, if the question is confined to the condition at the present time, or at the time the accident happened. I understand that condition does exist now, but didn't then.

Mr. McFARLAND.—I said "was." I didn't say "is."

The COURT.—Answer the question.

A. I didn't notice anything dumped in close there at that time.

Q. You didn't notice any old tin cans?

A. No, not very close.

Q. Any old rubbish?      A. No.

Q. Any manure?      A. No.

Q. Will you swear there wasn't any there between the latter part of March and the first of June?

A. Where?

Q. Right around in that pool and on the sawdust.

A. I didn't notice any.

Q. You didn't pay much attention to it, did you?

A. Yes, I took a view of the situation. I heard it was dangerous, and I took—

Mr. McFARLAND.—I ask to have that stricken out, that he heard it was dangerous. [113]

The COURT.—Yes, it may be stricken out.

Q. You didn't pay much attention to the condition of that sawdust pile and that pool until after this suit was brought, did you?

A. Just as much as I have since. I am not inter-

(Testimony of Adam Howard.)

ested in the suit one way or the other.

Q. How much of a pool did you say there was there?

A. It was somewheres in the neighborhood of eight or ten feet wide, and about twice that long at that time.

Q. You were familiar with it up to the first of June from the latter part of March?

A. Yes, sir, I had been there a few times.

Q. Did you try to measure the water to see how deep it was? A. No.

Q. Did you notice the water to see what kind of water it was? Was it black or muddy or clear?

A. It wasn't particularly clear, no.

Q. It was black, was it?

A. It was pretty muddy water, yes.

Q. You couldn't see the bottom in any place, could you? A. I don't think so.

Mr. McFARLAND.—That's all.

Mr. PLUMMER.—That is all, Mr. Howard.

[114]

**[Testimony of Josephine Grace Maynard Scott, for Plaintiffs.]**

JOSEPHINE GRACE MAYNARD SCOTT, duly called and sworn as a witness on behalf of plaintiffs, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. State your name in full.

A. Josephine Grace Maynard Scott.

(Testimony of Josephine Grace Maynard Scott.)

Q. Where do you reside?

A. St. Maries, Idaho.

Q. How close to the sawdust pile where these two boys were drowned, if you know?      A. That I live?

Q. Yes.

A. I should say about a block and a half.

Q. Where did you live with reference to the first tier of blocks immediately north of this vacant ground, being the south tier of blocks in the city limits; where did you live with reference to those?

A. We lived in the third block north, the third lot north.

Q. In the first block?

A. In numbered block 5 on the plat, lot 7.

Q. Now, point out on this map where you lived (exhibiting map to witness).

A. Seventh street—let's see—where is that? This is the—

Q. Assuming that the sawdust pile is there.

A. And that is the cemetery?

Q. Yes.

A. Then we lived in block 5, and lot 7, I think that is, isn't it?

Q. That is lot 7, yes.      A. This is north? [115]

Q. This is north this way.

A. And this is west?

Q. That is west.

A. Well, we live on Seventh street here, right there.

Q. That would be lot three, then, wouldn't it?

A. What is this street?

(Testimony of Josephine Grace Maynard Scott.)

Q. This is Washington.

A. Then we live in the second lot from Washington.

Q. That would be lot two, then?

A. Yes, there are two vacant lots.

Q. You live in lot two, and three and four were vacant, is that correct?

A. I thought we were on lot seven; we were on Seventh street, and there is two lots belonging to St. Maries village before you come to the Coeur d'Alene commons.

Q. That is lots three and four?      A. Yes, sir.

Q. And those you say are vacant?

A. Those are vacant.

Q. All right. I will mark that S for Scott, lot two, in block five, on Seventh street. How long did you live there prior to the time these boys were drowned?

A. We moved there the first of February.

Q. Previous to the drowning?

A. Previous to the drowning of the boys.

Q. What opportunities did you have of observing as to what this sawdust pile and the vicinity of the sawdust pile was used for, if anything, by children, during the time that you lived there, up to the time these boys were drowned?

A. Well, it was a very common occurrence to see children playing there; they used it as a playground.

[116]

Q. And what was there that appeared to attract children to that place?

Mr. McFARLAND.—We object to that as assum-



(Testimony of Josephine Grace Maynard Scott.)

ing that there was something there.

The COURT.—Sustained.

Q. Was there anything there to attract children to that place to play?

A. Well, it was a commons, and children will congregate on a commons.

Q. And what was there, if anything, other than just the grass there or the other ground, what was there there to attract children?

Mr. McFARLAND.—We object to that, if the Court please.

The COURT.—Sustained.

Q. Was there anything there excepting the ordinary earth to attract children?

A. Sawdust attracts many children; they like to put their bare feet in the sawdust and feel it running through their toes. I know I did.

Q. About how often, and about how many children, on an average, would you see playing in this sawdust pile around there?

A. If I wasn't on oath I would say it was an everyday occurrence, but it was a very, very common occurrence to see children there. Sometimes perhaps there wasn't any, some days, and again there might have been three or four to a dozen or fifteen.

Q. Did you notice or observe any particular games the children were playing there, what they were doing by way of playing?

A. I have often noticed them sliding down the sawdust upon [117] our side; I don't know whether they ever slid down the other side or not,

(Testimony of Josephine Grace Maynard Scott.)

but facing our house I have often watched or noticed them sliding down.

Q. What else, if anything, did you notice the children doing around there by way of playing?

A. I have seen them running along the top edge. The sawdust is extended quite high, and there is a steep slant toward our place, and I have seen them running on the top of that, and was often fearful that they might cave in and the sawdust cover them.

Q. You have observed this sawdust pile since the accident occurred, have you?

A. I have passed within the vicinity of it, but I have such a horror of it that I don't care to go near it.

Mr. McFARLAND.—If the Court please, I ask to have that last answer stricken out as not responsive, and being merely the opinion of this witness.

Mr. PLUMMER.—We consent.

The COURT.—Yes.

Q. I understood you to say you know where the hole is that they fell into?      A. I do.

Q. How close did these children play to where that hole is when you saw them playing on different occasions before this accident?

A. Right on the top of the sawdust pile, and slide down to the bottom. There wasn't very much of a place where they could stand after getting to the bottom before coming to the water.

Q. Steep right down to it?

A. The sawdust pile was quite steep; there was a little ledge that was sloping, but not very wide; I

(Testimony of Josephine Grace Maynard Scott.)

couldn't say just [118] how wide it is.

Q. Did you go up there when the boys were drowned? A. I did.

Q. Just tell what you observed there at that time?

A. Just as I went to it?

Q. Yes, just go ahead and tell what you saw there.

A. As I came to the sawdust pile my impression was from the reports that the children—

Mr. McFARLAND.—We object to her impressions.

A. I came to the sawdust pile, and there is a little narrow space that isn't as high as the remainder, and as I came to that I saw the two little bodies lying on the sawdust. Mr. Warner had just got them out of the water, and there was hardly room enough for four of us to get around the little bodies to work.

Q. What do you mean by room enough?

A. As they lay the bodies down, we had to be so near the edge of the water.

Q. Why?

A. Because of the slant of the sawdust, that there wasn't real good room to work.

Q. And you worked, did you, to try to resuscitate the boys?

A. I think it was near a quarter to twelve when they drowned, and I stayed until they took the bodies home, which was something after four o'clock.

Q. Was there anything there that you could see to indicate that the water was deep, deep enough to drown boys?

A. No, sir. I remarked, "How could they drown

(Testimony of Josephine Grace Maynard Scott.)  
in a puddle of water”?

Mr. McFARLAND.—I object to what she remarked.

Mr. PLUMMER.—I think that is part of the *res gestae*. You can take the witness. [119]

Cross-examination.

(By Mr. McFARLAND.)

Q. Mrs. Scott, have you any children?

A. Yes, sir, I have one.

Q. A boy or girl? A. Girl.

Q. How old is she? A. Eight years old.

Q. Did she play around that sawdust pile?

A. No, sir.

Q. You say you called that place where the sawdust pile and pool was a commons?

A. It was used as such.

Q. Why do you call it a “commons”?

A. Because it is not fenced, and there is no forbidding anyone on it.

Q. There is quite an open space there above the sawdust, isn't there?

A. There is an open space, certainly.

Q. This sawdust pile and pool is near a culvert, isn't it, or a kind of a bridge that is between it and St. Maries?

A. There is a small bridge across a creek.

Q. This creek flows from this pool, doesn't it?

A. I think not.

Q. Where does it come from then?

A. It is a well.

Q. How? A. It is a well.

(Testimony of Josephine Grace Maynard Scott.)

Q. What you call the well is within the pool, isn't it?      A. To me it looks like a puddle.

Q. Well, then, we will call it a puddle. The well you [120] speak of is this puddle, isn't it?

A. Yes, sir.

Q. And this little stream that runs under the culvert comes from the puddle and the well, does it not?

A. I think not.

Q. Then where does it come from?

A. I think it is a stream coming from the mountains.

Q. Doesn't it come from the mountains, pass through the pool, and over what you call the well, and then down under this culvert?

A. No, sir, it couldn't get through the sawdust.

Q. Are you sure about that?

A. There may be an outlet to those wells running to that creek. I won't swear to that, because there is a little clear space beyond. I never have been to examine it.

Q. Now, this pool or well, or both, is not between the sawdust pile and your house, is it?

A. No, sir. It is the other side of part of the sawdust pile.

Q. And the boys slid down the sawdust pile on the side toward your house?      A. Not these—

Q. I say you saw boys doing it?

A. I have seen them doing it.

Q. When they were sliding on the other side you couldn't see them from your house, could you?

A. No, sir.



(Testimony of Josephine Grace Maynard Scott.)

Q. Did you see that sawdust pile frequently in the month of May, 1911?      A. Yes, sir, every day.

Q. Were you up there at any time? [121]

A. I have passed by there.

Q. Had there been any fire in the sawdust pile?

A. There had been.

Q. That year?

A. From the time we moved there frequently there was a little fire.

Q. Even in the month of May, 1911?

A. I think there was a fire broke out there, supposedly to have been set by children. We sent in a report, but I couldn't swear whether it was the month of May or not.

Q. And in 1911 there was quite a forest fire around that region?      A. So I have heard.

Q. Were you living there at that time?

A. No, sir.

Q. No part of 1910?

A. We came there in September, 1910, the latter part; the fires were over.

Q. Was there fire in that locality at that time?

A. There was fire in the sawdust at that time.

Q. That sawdust pile had been pretty badly burnt over, hadn't it?

A. I think at the time it had, but when we moved there—we build a house there,—and when we moved there there was a great deal of the sawdust pile that looked very fresh, as though the upper part had been either taken away by reams or by children scattering it around.

(Testimony of Josephine Grace Maynard Scott.)

Q. It was kind of decomposed, wasn't it?

A. No, sir.

Q. Wasn't it kind of blackened?

A. There was black spots. [122]

Q. Wasn't it honeycombed where the fire had gone through and into it? A. I had heard so.

Q. Did you go up there and see it? A. No, sir.

Q. Did you go to the pool and examine it?

A. I didn't know there was a pool there until the children were drowned.

Q. You didn't know there was any water there at all? A. No, sir.

Q. When you did go there you looked at it, didn't you? A. Yes, sir.

Q. What kind of an appearance did it present?

A. It just looked like a standing puddle.

Q. Black water? A. The water was muddy.

Q. And you could not see the bottom of it?

A. I could not see the bottom of it; there was saw-dust floating around on top.

Q. Yes, and scum?

A. No, sir, I didn't notice any scum; I noticed saw-dust and little sticks.

Q. Did you notice any garbage around there?

A. There was not at that time.

Q. You are sure of that? A. Yes, sir.

Q. There weren't any old tin cans?

A. No, sir. There was a barrel there, but I carried it there myself at the time the children were drowned.

Q. Was there any refuse from stables around there? A. No, sir, I didn't see any. [123]

(Testimony of Josephine Grace Maynard Scott.)

Q. Is your memory good as to that? Did you notice it particularly enough to remember whether or not there was such?

A. I can remember very distinctly how the place looked. I was there long enough, was there you might say the best part of the day. Of course in the first place I couldn't have sworn to it—there was too much excitement—but after the doctor said there was no hopes for the children I looked around, and I saw their little underwear laying on the bank, on the sawdust.

Q. Now, how wide and how long were these commons?

A. I couldn't say, because they extend back to the mountains.

Q. They extend back to the mountains?

A. Yes, sir, and include the mountains.

Q. It is an open country there?

A. It is an open country.

Q. Didn't the children play more back of the sawdust and toward the mountains than they did right on the sawdust?

A. I never observed them playing anywhere back of the sawdust pile.

Q. Because you couldn't have seen them from your house, could you?

A. I could have seen them a little beyond, yes, sir.

Q. If they were high enough on the hill you could see them? A. If they were far enough back.

Q. But the sawdust pile obstructed the view from your house, did it not?

(Testimony of Josephine Grace Maynard Scott.)

A. Not where they could play, because of the condition of the ground just back of the sawdust pile, where, as I supposed, the mill had been burned, but I heard since that it was removed.

Q. How far would this be from the sawdust pile?

Mr. PLUMMER.—What do you mean by “this”?  
[124]

Q. Where you could see the children playing on the other side of the sawdust pile?

A. I really couldn't say just how far.

Q. Was it a hundred yards?

A. Within a hundred yards there was flowers and such things growing that would attract children.

Q. I say was it a hundred yards from the sawdust pile to where you could see them playing?

A. Yes, they could go a hundred yards back, and nearer still, but I don't know just how many feet back before I could observe them.

Mr. McFARLAND.—That is all.

Mr. PLUMMER.—That is all. [125]

**[Testimony of Elizabeth Maynard, for Plaintiffs.]**

ELIZABETH MAYNARD, duly called and sworn as a witness on behalf of plaintiffs, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. State your name, please.

A. Elizabeth Maynard.

Q. What relation are you to the lady that just testified—Mrs. Scott?      A. I am her mother.

(Testimony of Elizabeth Maynard.)

Q. Do you live at St. Maries?     A. Yes, sir.

Q. Where do you live with reference to where Mrs. Scott lived?

A. That was my home; she lived with me.

Q. Did you live there all the time that she lived there?     A. Yes, sir.

Q. When did you first move in there?

A. We moved in there about the first of February, I think.

Q. What year?

A. It was the year before the children were drowned; they were drowned in June. We went there in February, and they were drowned in June.

Q. Following?     A. Yes, sir.

Q. What did you observe, if anything, with reference to the condition of the land there, just south of your place, this open land owned by the Coeur d'Alene Lumber Company, what did you observe about that land, if anything, that was on the land?

A. Well, I don't understand what you mean by observing. You mean the location of the land? [126]

Q. No. I mean what was on the land other than the land itself.

A. Well, there was a big sawdust pile, a very large one.

Q. What was the condition of this sawdust pile before the boys were drowned? What was its condition with reference to whether it was scattered around, or straight up and down?

A. Well, I couldn't say what the condition was, but I have heard since that it was dangerous.



(Testimony of Elizabeth Maynard.)

Mr. McFARLAND.—I ask to have that stricken out.

Mr. PLUMMER.—We consent.

A. But I didn't know.

Q. During the time you lived there before the boys were drowned, did you ever see children playing around on the sawdust pile?     A. Yes, sir.

Q. What is the opportunity for observation from your house right to the sawdust pile?

A. We could see it right from our home, the sawdust pile.

Q. How often would you see children playing around on the sawdust pile, between the time you moved there and the time this accident occurred?

A. I couldn't say how often, but very often. It was a common occurrence, but not knowing that we would ever have to repeat it we didn't think of—

Q. Marking it down?     A. No.

Q. What I want to get at is what your recollection is as to whether it was a daily occurrence or a weekly occurrence, or a monthly occurrence. [127]

A. It must surely have been a daily occurrence when it was fine weather. Some children were there nearly all the time.

Q. What did they appear to be playing?

A. Well, digging into the sawdust, and sliding down, and having a good time generally.

Q. About how many children, on an average, would you see around there at different times?

A. Well, if you will excuse me, I never stopped to count them. Sometimes there was quite a number,

(Testimony of Elizabeth Maynard.)

and other times there was perhaps a few; I couldn't say how many.

Q. What do you mean by quite a number—a dozen or so?

A. Well, it might be, or less; I never paid any attention to how many there was there.

Q. Did you go over there with Mrs. Scott at the time the boys were drowned, after they were drowned?

A. Yes, sir, I went when I see the commotion and see people running. We supposed they were buried in the sawdust, and we went, but when I saw the little bodies I couldn't stand that; I went back.

Mr. PLUMMER.—That is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. How far did you live from this sawdust pile, Mrs. Maynard?

A. I couldn't say how many yards.

Q. About three hundred yards?

A. There was two lots beyond us, and then came the Coeur d'Alene—

Q. You didn't know anything about that pool that was there?

A. No, sir, I never had seen or heard anything about it. [128]

Q. How long had you been living at that place at the time of the accident?

A. We moved there in February, and we built a new house and moved in it the first of February.

Q. February, 1911?

(Testimony of Elizabeth Maynard.)

A. And the boys were drowned the first of June.

Q. During the time you were living there did you see that sawdust pile on fire?     A. Yes, sir.

Q. How much of that time from February to the first of June?

A. Well, sir, I couldn't say. Pardon me, I couldn't tell, because I didn't know.

Q. Was it much of the time?

A. Well, a few times I know they went and put it out.

Q. Had you been up to this sawdust pile prior to the accident?

A. Yes, sir, I had passed on the street. The street runs very near the sawdust pile, but I had never been on the other side of the sawdust pile.

Q. And you did not go right up to the sawdust pile?

A. Yes, sir, we had to go right up to the sawdust pile to pass.

Q. And you saw that the sawdust pile was honey-combed with holes that had been caused by fire, didn't you?     A. Yes, I saw holes in it, yes, sir.

Q. And the sawdust was blackened from the fire, wasn't it?

A. Well, not so much as one would expect. I think the sawdust rather covered it after the fire. Not so much as one would expect.

Q. Wasn't the sawdust itself decayed? [129]

A. No, I think not.

Q. Wasn't it very much browned and blackened by the action of the sun and the water that had been thrown on it to put out the fire?

(Testimony of Elizabeth Maynard.)

A. Well, I think not; I don't remember just how it looked.

Q. You don't know as to that fact then?

A. No. I think it looked just like sawdust.

Q. You could see that sawdust pile plainly and distinctly from your home, could you?

A. Yes, sir.

Q. Was it uphill or downhill from your house?

A. There was no hills.

Q. It is on the level?      A. Level with our house.

Q. Did your door face the sawdust pile?

A. Yes, sir.

Q. And you would go out and look at that place often?

A. Well, we couldn't help when we were out in the back yard seeing the sawdust pile, as there was no other scenery.

Q. You could see the sawdust pile from the back part of your house?      A. From our kitchen.

Q. But not from the front part?

A. Yes, sir. Well, I think not; there was a little group of trees that hid it.

Q. You didn't pay much attention to the sawdust pile, did you?      A. No, sir.

Q. And you didn't pay much attention to the children that played there? [130]

A. Well, I felt kind of bad to see the children playing there.

Q. But you didn't pay much attention?

A. It was none of my business.

Q. Did you see any children out on the common

(Testimony of Elizabeth Maynard.)

beyond the sawdust pile playing on the grass?

A. Oh, yes, I have often seen them there.

Q. They played there more often than they did in the sawdust, didn't they?

A. No, sir, I think not.

Q. Do you know whether they did, or are you just guessing at it?

A. Pardon me. I had to do my own work, and I wasn't watching the children all the time, so I couldn't say they were on the commons the most or the sawdust pile the most, but there was children there playing all the time.

Q. You had your household duties to attend to?

A. Yes, sir.

Q. And you were pretty busy?      A. Yes, sir.

Q. And you didn't have much time to pay attention to other people's children?

A. No, sir, I had children of my own.

Q. And you didn't do it, did you?

A. No, sir, but I have regretted very much that I didn't.

Mr. McFARLAND.—That is all.

Mr. PLUMMER.—That is all. [131]

**[Testimony of Frank B. Jones, for Plaintiffs  
(Recalled).]**

FRANK B. JONES, a witness heretofore duly called and sworn on behalf of the plaintiffs, upon being recalled, testified as follows, on further

Cross-examination.

(By Mr. McFARLAND.)

Q. Mr. Jones, what year was this that you were



(Testimony of Frank B. Jones.)

watching the fire there?

A. Let's see. The boys were drowned—it was 1910.

Q. How much of the time in 1910 was that sawdust on fire? A. How much time?

Q. How much of the time in 1910?

A. Well, the fire—I don't know just when the fire did break out, that forest fire; it was afire a long time there.

Q. That sawdust pile caught on fire from the forest fire, did it? A. Yes, sir.

Q. It wasn't set there by Schmidt Brothers or the Coeur d'Alene Lumber Company? A. No, sir.

Q. To what time in 1910 did the sawdust continue on fire? A. How long a time did it continue?

Q. To what time in 1910 did it continue or remain to be on fire? A. I couldn't tell you how long.

Q. Do you know whether it was on fire in 1911?

A. I think it was; I think there was fire in there in 1911; I think it lasted there all winter underneath; I don't know as to that. I know it was a pretty hard fire to put out.

Q. You saw it on fire in 1911, didn't you?

A. No, sir, I wouldn't swear to it. [132]

Q. Were you up near it in 1911? A. Yes, sir.

Q. Did you see any smoke coming out of it?

A. I don't just recollect whether there was or not; I think there was though.

Q. What time would that be in 1911?

A. I couldn't say.

Q. Did I understand you to say that the sawdust

(Testimony of Frank B. Jones.)

pile was pretty well honeycombed with holes caused by the fire?

A. Well, of course, the fire running over this sawdust pile, there was ashes and such stuff as that over the top, that is, where it would run up on the sides.

Q. Yes, and there were great holes burnt there, were there not?

A. Underneath, yes, sir, there was.

Q. Wouldn't you say there was a kind of tunnel burnt through there?

A. Well, the fire worked in under the sawdust pile.

Q. And you were afraid it would undermine the pile? A. Yes, sir.

Q. You put a great deal of water on that?

A. Yes, sir, I did.

Q. During the time you were guarding it?

A. Yes, sir.

Q. And the water and the fire together blackened the pile up considerably, didn't it?

A. It did to a certain extent, yes, sir.

Q. And decayed it to a certain extent, didn't it?

A. It did, yes, sir.

Q. You say you noticed this water there while you were [133] tending this sawdust pile?

A. I did. I was getting water below this pile, and I happened to think of this place up there, and I goes up there to get the water.

Q. That water was blackened? A. Yes, sir.

Q. And there was sawdust floating on top of it?

A. Yes, sir.

Q. And there was scum on top of it, wasn't there?

(Testimony of Frank B. Jones.)

A. I think there was a little, yes, sir.

Q. The scum that usually accumulates on pools?

A. Yes, sir, I think a little.

Q. Wasn't there a kind of a stream or outlet that went down toward St. Maries under a culvert there from this pool?

A. I think there was, and I think when it was put there they made some preparation for this water to be carried away. I don't know as to that, but I know it comes out below the sawdust pile.

Q. Do you know what caused that to stop, to become stopped up, closed up?

A. No, unless it was the sawdust.

Q. The burning of the sawdust?

A. I don't think the burning had anything to do with it. I think the settling of the sawdust would naturally stop the passage.

Mr. McFARLAND.—That is all.

Mr. PLUMMER.—That is all. [134]

**[Testimony of O. J. Thompson, for Plaintiffs  
(Recalled).]**

O. J. THOMPSON duly called and sworn on be-

O. J. THOMPSON, heretofore duly called and sworn on behalf of plaintiffs, testified as follows, on being recalled:

Direct Examination.

(By Mr. PLUMMER.)

Q. Mr. Thompson, have you heard the reference which counsel has made to a certain creek in the vicinity of this sawdust pile? A. Yes, sir.

Q. At the time these boys were drowned was there

(Testimony of O. J. Thompson.)

any creek there at all running into these wells, this well?     A. Not that I know of.

Q. Did you see any there?     A. No, sir.

Q. Did you ever see any there?

A. I never was there before at those wells.

Mr. PLUMMER.—I think that is all.

Cross-examination.

(By Mr. McFARLAND.)

Q. You don't know whether there was a little stream that flowed into that pool or not, do you?

A. There was no stream there.

Q. Are you sure of that?     A. Yes, sir.

Q. Have you been there since?     A. Yes, sir.

Q. Have you seen a stream there?

A. I never seen a stream of water running there.

Q. When was the last time?

A. I don't just remember the day; it was within the last two or three weeks. [135]

Q. You were there within the last two or three weeks?     A. Yes, sir.

Q. Do you mean to say that during no part of that time there has been a stream flowing into that pool?

A. I never seen any stream flowing in there.

Mr. PLUMMER.—I presume, if the Court please, it would be proper to save time, to make an offer of proof with reference to this point. I think that under the decision of the Supreme Court of this State, in construing the statute under which this action was brought, we have a right to show just what assistance this boy was to the father in carrying on his business of handling the "Spokesman Review" at

(Testimony of O. J. Thompson.)

St. Maries, and also to show the association between the father and the son. I have reference, if your Honor please, to the case of *Golden vs. The Spokane Inland Empire Railroad Company*, in which an instruction was given covering those lines by the lower court, and was approved and affirmed by the Supreme Court. I will read the instruction so as to advise the Court just what point I want to make. It is approved in that case by the Supreme Court. (Reading instruction.)

The Court can see that it is broader than the common-law rule, and I wish to make an offer of proof covering those points.

The COURT.—Haven't you covered all the points covered by that instruction?

Mr. PLUMMER.—I don't think I have quite, your Honor.

The COURT.—What one haven't you?

Mr. PLUMMER.—Counsel just calls my attention to [136] another instruction too. "The Court instructs the jury that, in estimating the damages sustained by the father by reason of the death of his infant child, the jury may estimate such damages upon the basis of what the son's services would have been worth to his father from the date of the injury to the time he would have arrived at the age of twenty-one years, with any sum that he might reasonably expect from such son after coming of age, if any such is shown by the evidence, deducting therefrom the costs and expenses of the father in his support and maintenance during his minority."



(Testimony of O. J. Thompson.)

The COURT.—That is exactly the suggestion I made to you yesterday; if you would promise to follow up the proof by showing what it would cost to maintain him I would permit you to enter into that.

Mr. McFARLAND.—We object to the offer, and to the admission of the testimony offered by counsel, upon the ground that it is incompetent, irrelevant and immaterial, and not pertinent to any issues in the case, because there is no allegation in the complaint as to the loss of services or companionship, or anything of that kind. In this case the complaint specifically charged and averred the loss of companionship and the loss of services, and went on to allege that this boy was a bright, active, strong, healthy boy, and was of great assistance and comfort, and was a companion of his parents, and all this is under those allegations. I am familiar with the case. I have read the complaint time and again, and the transcript in the case, and under those allegations the Court permitted that proof, and the Supreme Court, on appeal, in passing upon those questions, stated that the [137] instruction in that regard was proper, but now in this case we have no reference to the services of the boy, that he was of any service or use to his parents, or that he was a companion, or anything of that kind; and of course we relied upon the allegations of the complaint, and we made no preparation to meet evidence that the boy was of assistance to his parents, or that he associated with his parents, or that he was a comfort to his parents. We simply expected the plaintiff to be confined in his proof to the allegations of the complaint. I may be mistaken.

(Testimony of O. J. Thompson.)

but I don't think counsel can find a case where, when there is no proof or averment or allegation with reference to those things, the testimony is admissible.

The COURT.—You can go into this only upon your promise to show the whole matter.

Mr. WHITLA.—I was one of the attorneys in the case of *Golden vs. Spokane and Inland Empire Railroad Company*, and in that case the very thing we are offering here was proven, but the Supreme Court held that the instruction was proper, and that it was incumbent upon the other party to make that showing, and we raised objection to that very instruction, and that was one of the instructions we went to the Supreme Court on, and the Supreme Court decided against us in that case.

The COURT.—You may make your offer.

Mr. PLUMMER.—The plaintiff Thompson offers to prove—

The COURT.—You may ask your question.

Q. Mr. Thompson, I believe you testified that before your son was drowned you were engaged in handling the "Spokesman Review" at St. Maries?  
[138]

A. Yes, sir.

Q. State what, if any, assistance your son gave you in handling that business in St. Maries prior to his death.

Mr. McFARLAND.—We object to that, if the Court please, as irrelevant, incompetent and immaterial, and not pertinent or responsive to any of the issues in the case, it not being alleged in the complaint.

(Testimony of O. J. Thompson.)

The COURT.—The objection will be sustained unless counsel for the plaintiff promise to show what the burden of maintaining and educating the child would be to the plaintiff.

Mr. PLUMMER.—You mean as distinguished from ordinary children?

The COURT.—No; I mean that if you go into this matter at all you must show what the net value of the child's assistance would be to the father.

Mr. PLUMMER.—If your Honor please, of course, I don't want to make any promises I can't carry out. I want to make this suggestion to the court. It seems to me the cost of raising and maintaining a child of that age up to his majority, especially in this community, where the jury all come from, it seems to me is a question of fact more than a question—is a question that the jury can consider as well as anybody else, and it is impossible, unless the parent keeps absolute account of the cost, to testify to what the relation would be of their earning capacity to the cost of their keep, especially when he is helping his father and not working by himself. At the same time it was a direct damage to the father which the jury can calculate and fix, based upon the degree of [139] assistance which he gave him, and it is certainly an element of damage and loss to him which he has a right to recover for, and which the jury has a right to consider, but it can't be determined in absolute dollars and cents. Besides that, it is important to show what was the general ambition of the boy, and his business qualifications, as indi-

(Testimony of O. J. Thompson.)

ating a promise in the future of earning capacity. It goes to the element of damage. Take a boy that is absolutely indolent and shiftless and don't care and unruly—

The COURT.—I permitted you to show that. I have already permitted you to show his qualities. You have shown that he was an intelligent, bright boy, physically well, and ambitious. The objection is sustained, except upon that promise.

Mr. PLUMMER.—We will except, upon the statement which I make that it is impossible for the parents to determine in dollars and cents just what the relative proportion would be of his cost of keep to the money he would earn or the value of his services.

The COURT.—Yes.

Q. Have you any other children, Mr. Thompson?

A. I have.

Q. What children? A. I have a girl.

Q. One girl? A. Yes, sir.

Mr. PLUMMER.—That is all.

Mr. McFARLAND.—That is all. [140]

**[Testimony of Elijah O. Moore, for Plaintiffs.]**

ELIJAH O. MOORE, duly called and sworn on behalf of the plaintiffs, upon being recalled, testified as follows:

Direct Examination.

(By Mr. PLUMMER.)

Q. Mr. Moore, you were the father of this boy who was drowned? A. Yes, sir.

Q. How old was he when he was drowned?

A. Eight years, three months and ten days.



(Testimony of Elijah O. Moore.)

Q. What was his general characteristics with reference to being a smart, active, energetic, ambitious boy, or otherwise?

A. He had showed good qualities both of disposition, and bright.

Mr. McFARLAND.—Your Honor will consider our objection as going to all of that?

The COURT.—Yes. Overruled.

Mr. McFARLAND.—An exception.

Q. Any other qualities that you observed that he possessed?

A. He was strong and his great qualities was peddling or doing anything he could to make money; it was the theory of him to a great extent.

Q. What was his condition of health?

A. Good.

Q. Were you there after he was drowned, there at the place of the drowning?

A. I didn't get there until after the bodies were removed.

Q. You were there shortly afterwards?

A. I went to the hole right afterwards.

Q. Did you see any creek there at the time running into this well? [141]

A. I didn't see any creek. I saw what I took to be where they had had a pipe or something made with a board that turned the water to get it into the well.

Q. You mean a kind of a trough?

A. Yes; I don't just remember whether it was a trough or a pipe, but something of that kind.



(Testimony of Elijah O. Moore.)

Q. Did you ever see any creek of any kind running into this well?

A. No, sir. There is a little creek runs there in the spring or in the fall when it is wet.

Q. But at this time of the year it was dry?

A. In the summer-time it is practically all dry in that vicinity.

Q. Did you ever see any creek in that vicinity?

A. I never was at that place exactly until after the boys was drowned.

Mr. PLUMMER.—That's all.

Cross-examination.

(By Mr. McFARLAND.)

Q. You say you never was at the sawdust pile or pool prior to the drowning of the boys?

A. Yes, sir.

Q. Have you been there frequently since?

A. I haven't been there but once or twice since the boys was drowned; haven't any reason to go there, and didn't care particularly to see it.

Q. Have you been there this spring?

A. No, sir.

Q. Then you don't know anything about that little stream that comes down the valley and flows into this pool? [142]

A. There might have been a stream come there since I left there; that was two years ago, and often conditions changes in two years.

Mr. McFARLAND.—That is all.

Mr. PLUMMER.—That is all. Of course we make the same offer, if the Court please, as to Mr.

(Testimony of Elijah O. Moore.)

Moore, and I suppose the same ruling would be made.

The COURT.—Yes.

**[Motion for Leave to Make an Interlineation in  
Paragraph 7 of Complaint, etc.]**

Mr. WHITLA.—As to the ruling of your Honor yesterday as to the amendments by interlineation, we ask leave to make the following interlineation in paragraph seven of the original complaint: “That in addition to said well so located on said land of the defendant a large amount of sawdust had been accumulated from the lumber mill theretofore located on said land, and said sawdust was strewn and scattered around and upon said land and surrounding said well as aforesaid in large piles, and constituted and was an attractive and inviting place for children of tender years to congregate and play, and children of tender years did habitually play upon the lands of said defendant, and the well or cistern herein complained of was located adjoining said sawdust pile so that said sawdust pile partially surrounded the same, and by reason of the location of said sawdust pile the lands of defendant attracted children thereto to play thereon and upon said sawdust pile surrounding said well or cistern.”

Mr. McFARLAND.—We object to all of that, if the Court please. The Court, as I understood—I may be mistaken—said that counsel might interline the complaint to show that sawdust had accumulated there and was [143] attractive, but it seems to me the proposed amendment there covers more ground than your Honor granted, and we object upon the

ground that it comes too late, and that the defendant is taken by surprise, not having had sufficient notice.

The COURT.—I think it is more elaborate than is necessary, but I don't see that it adds anything to the substance of what was suggested. I had supposed that just a sentence would be interlined. I suppose counsel get used to elaborating things, and it is pretty hard to state it directly. In this day of stenographers and typewriters it is pretty hard to say in a half dozen words. The objection will be overruled.

Mr. McFARLAND.—We except.

Mr. PLUMMER.—Now, if your Honor please, with reference to paragraph eight, the paragraph which we discussed yesterday about this condition being open and notorious, if there is any possible chance of a misconstruction of it or misconstruing its intended meaning, I would ask to strike out of that paragraph all the matter which tends to indicate that the plaintiffs knew anything about the dangerous condition of these premises. It never occurred to me until counsel objected to it yesterday that any such construction as contended for by counsel would be placed upon it. Certainly Mr. McFarland, who drew the answers and had charge of the cases up to yesterday morning, didn't place any such construction on it, because he specifically denied that allegation, and if that allegation is meant to be construed as being a direct assertion on his part that he himself is guilty of contributory negligence, certainly counsel wouldn't have denied it, and [144] then set up the same thing himself by way of affirmative defense, and

I offer that as an exercise of abundance of precaution in the case.

Mr. McFARLAND.—If the Court please, your Honor will remember that when I argued the demurrer I called your Honor's attention particularly to that feature of the complaint, and your Honor at the time, in passing upon the demurrer, according to my recollection, indicated that perhaps that was the strongest point that we made upon our demurrer, and I did insist upon that objection all the way through. We certainly object.

Mr. PLUMMER.—Counsel can't be taken by surprise at this time, because, as I say, they have denied the allegation, and there is no proof on the subject, and they have set up his contributory negligence as an affirmative defense to their answer, which, of course, they wouldn't have done if they had construed that as it has been construed since Brother Heitman has been in the case.

The COURT.—I have been very much in doubt as to what to do with this clause. Of course I don't want to see an injustice done by reason of it. There seems to be some danger of doing an injustice to one side or the other.

Mr. PLUMMER.—I might make this suggestion, if your Honor please, that of course I wasn't here when the demurrer was argued, and if I had been, and the Court had made any intimation on that particular paragraph, I should have amended the complaint anyway, but inasmuch as the Court overruled the demurrer to the complaint, [145] and evidently construed the paragraph as I now intend it



should be construed, it prevented us from the opportunity of this amendment in the proper way so as to eliminate that feature, and now, if the Court please, if that has any part at all in the case which might result in defeat to the plaintiffs, the statute of limitations has now run against them, and I think that would be the greatest injustice which could be done, since the Court has taken this view of the case before.

The COURT.—The statute of limitations hasn't run, has it?

Mr. PLUMMER.—Two years, your Honor.

Mr. McFARLAND.—Counsel's attention was called to that feature of the case at the time the demurrer was argued, and there has been considerable time elapsed since that time, and counsel can't wait until after the statute has intervened and then come into court and base their excuse upon that ground. It seems to me that when the plaintiff in an action alleges a state of facts he must be compelled to rely upon it, and not by amendment or by proofs be allowed to contradict the very facts upon which he bases his action in the first instance. I think it would be an injustice to the defendant, if the Court please, if they are permitted to prove facts contrary to the allegations of the complaint.

Mr. PLUMMER.—I want to call the Court's attention to the answer of the defendant as to that paragraph eight. They are now claiming that we are alleging that plaintiffs knew of the existence of the condition of the premises there, and in paragraph six of their answer, the amended [146] answer, they say this: "In answer to paragraph eight of said



complaint defendant denies that the alleged dangerous or any condition of said premises, or the danger of small children falling into said alleged well or cistern or becoming drowned, or the habitual use of said premises by said Bernarr Thompson or other companions or children of tender years, or of any years, was open or notorious up to the time of the death of said Bernarr Thompson, or otherwise, or at all, or was well known to said defendant at said time, or any time, or at all, and denies that, on account of the alleged tender years of said Bernarr Thompson, or otherwise or at all, he, the said Bernarr Thompson, did not know or appreciate the alleged dangerous conditions'' and so on. They deny that very paragraph, which goes to show they can't be misled or injured. Then they plead affirmatively the very fact that Mr. Thompson did know about the dangerous condition, and did know that the children went there and played. As I say, the whole theory of the pleadings bears out what we contend for. I simply intended to charge the defendant with implied notice, on account of the notorious condition of their own property. It certainly was construed in that way by counsel when he drew his answer. No possible harm can come from it.

Mr. HEITMAN.—If your Honor please, in setting up our affirmative answer by way of contributory negligence we had to allege that plaintiff knew of the existence of this pond or sink, and we had to set up the plea of the plaintiff's contributory negligence, and we did it in the usual form, using the usual language in such cases. But that doesn't add to, that

doesn't aid the plaintiff, because he has pleaded the same thing. He pleads a state of facts, and we repeat that formally in making our plea of contributory negligence. Now it isn't necessary to bring to this court [147] authorities giving the definition of the words "open and notorious," because we all know, and the Court knows better than any of us, the legal meaning of those words, and in paragraph eight of the complaint all of these allegations are taken together. The punctuation shows the sense that the pleader intended to convey by the language, that the dangerous condition of said premises, and the danger of small children falling in the said well or cistern and becoming drowned, and the habitual use of said premises by said Russell G. Moore and other companions and children of tender years was open and notorious,—not at the time, as Mr. Plummer undertook to say yesterday,—“was open and notorious up to the time of the death of the said Russell G. Moore,” which refers, of course, to that time and the dates preceding. “And was well known to said defendant, but that on account of the tender years of the said Russell G. Moore he did not know or appreciate the dangerous conditions.” It affirmatively shows, if your Honor please, if the English language means anything, that this condition was known, that this condition of the premises and the habitual use of the same by children was notoriously known to the plaintiff, but it wasn't known to the boys, or wasn't appreciated by them. Now, on reading this complaint, if the Court please, and preparing for our defense, we are entitled to consider this language, we are entitled

to construe it in the ordinary acceptation and meaning of the words. Suppose the plaintiff, on the other hand, had alleged that the plaintiff was ignorant of the dangerous condition of the premises, and that he was ignorant that these premises had been habitually used by these children, then we would have been in a position, we would have felt called upon to have some witnesses here to disprove that fact, and to prove they did know it. Now, we [148] are confronted with proof which we are not prepared to meet.

Mr. PLUMMER.—Of course that last remark made by counsel seems to me to be spoken ill-advisedly, because he would have to have the same proof to establish an affirmative defense as he would have to have to deny the allegations of paragraph eight, if construed the way we think it ought to be construed. They would have to have the same evidence and witnesses to prove contributory negligence as to disprove that we were not guilty of contributory negligence. Besides that, if the Court please, Mr. Thompson testified, without any objection by counsel, and was cross-examined upon that point, that he never was on that ground before in his life until after these boys were drowned. If that is true, and he lived six blocks away from the place, by all intendments and reasonable inferences the record here shows, the testimony shows, and ought to be considered by the jury as indicating, that he didn't know, understand, or appreciate the dangerous character and condition of these premises. That went in without objection; they cross-examined him on it. It is evidence which tends to establish the fact that he did

not know the condition of these premises, and the Court well knows the rule that where the evidence has gone in without objection the pleadings will be considered to be amended to conform to the proof. Mrs. Moore swore to the same thing.

The COURT.—Of course, while that evidence would tend to show, it wouldn't do more than that, because he might have known of the condition in several different ways; he might have been directly informed of the condition without having been there. He might have known it in different ways. Of course, as to the other point, as to establishing the affirmative defense, the defendant always has a right to rely upon an admission of the complaint to establish [149] a part of the affirmative defense, and there is where the real difficulty arises. I wouldn't hesitate to permit you to amend for a moment if it were not for the peculiar predicament in which the case is placed by doing so. I think it is not an unfair construction of the pleading to interpret it as meaning that these facts were generally known in that community, and it appearing that the plaintiffs lived in that community at that time they with others would share in this knowledge. Now, you come here at the last moment, after the case is called, after it has been set down for trial, in fact at the very time when a jury is to be called, and you ask to amend in this respect. It is true upon the other hand that the defendant denies this allegation, and then sets up substantially the same matter so far as pertains to the plaintiff in the affirmative defense.

Mr. HEITMAN.—We had to do that, if your Honor



please, in order to present—

The COURT.—The difficulty is here, Mr. Heitman, in that respect; now, that is, it leaves the Court in this embarrassing position. Here is an allegation which you now construe as being an admission on the part of the plaintiff that he knew of the dangerous condition there, and knew that the child was from day to day imperiling himself by playing about the open well and pool; that is, you deny that *in toto*. You don't deny it in any qualified way. You don't deny that it was notorious one place, and not known and notorious in another. But you deny that allegation with all of its implications; that is, its implied charge of knowledge on the defendant's part, and also its implied admission of knowledge on the part of the plaintiff. Mr. McFarland has referred to the argument upon the demurrer. I have no distinct recollection about that. I seem to have filed no written memorandum. Upon looking [150] at the demurrer I find that it is a general demurrer, and also a special demurrer for uncertainty, but this particular feature of the case is not, in terms at least, pointed out by the demurrer, and I have no recollection at all of it, what points were made upon the demurrer, or who argued it even. Of course a great many of these matters are submitted, and unless the argument is quite formal or extended, or unless I file a memorandum decision, very often it goes out of mind.

Mr. HEITMAN.—I, of course, wasn't in the case at the time of the argument of the demurrer, I take it that Mr. McFarland, after the demurrer was over-



ruled—and I understand he impressed this point upon the Court—that out of the abundance of precaution we felt called upon to set up the defense of contributory negligence in the usual language in such cases. That certainly wouldn't waive any rights that the defendant might have to rely upon the admissions of the complaint. It strikes me that the language of paragraph eight of this complaint tends rather strongly to show contributory negligence.

The COURT.—If Mr. McFarland remembers that he argued that point, of course, I wouldn't question for a moment that it was argued. I have no recollection at all as to what was argued.

Mr. WHITLA.—Of course, if the Court please, I presented that argument on behalf of Mr. Plummer, and Mr. McFarland called the Court's attention to the allegation that the ownership of the land was very indefinite, and there was not a case submitted on the argument at all. I made no argument at all. Mr. McFarland simply called your Honor's attention to the fact that the allegations of the complaint relative to the ownership of the land were indefinite and didn't say when the Coeur d'Alene Lumber Company became the owner of it, and a few other points like that, and submitted the case upon that point. [151]

Mr. McFARLAND.—Your Honor, I remember arguing this case distinctly, and I remember the remarks that your Honor made at that time, and I took the position, and as I believe now, sustained by the law, that where the complaint shows contributory negligence on the part of the plaintiff that the evidence of that fact may be taken by general demurrer,

and of course I did argue at some length the uncertainty of the complaint in regard to the time that the defendant is presumed to have owned the premises. Now, I made the opening talk, Mr. Whitla follows, and I even replied, and I insisted again upon our objection that the complaint showed contributory negligence on the part of the plaintiff. And after submitting the case to your Honor, your Honor stated that you didn't think there was any merit—I can repeat your Honor's language—in our demurrer, unless it would be as to contributory negligence, and also stated that while it might have been most open and notorious that the premises were dangerous, and that the children habitually played thereabouts, that yet the plaintiff may not have known it. Upon your Honor's overruling this demurrer we were required in framing our answer and defense to state contributory negligence. We couldn't, after the order denying the new trial, and particularly on that ground, we couldn't proceed upon the theory that your Honor would hold that that was implied knowledge or notice on the part of the plaintiff. So we were placed in that predicament. And it seems that now, after the demurrer was overruled, and we were required to answer, that counsel cannot take advantage of our defense of contributory negligence to cure the admission of contributory negligence in this complaint; it seems to me that isn't reasonable.

The COURT.—It is not improbable, of course, that that occurred which you have stated. If I expressed the view that you attribute [152] to me, I still feel that the view is correct, that is to say, that the

complaint upon its face does not necessarily show contributory negligence. This fact may have been notorious, open and notorious, and still the plaintiff here might have known nothing about it. He might have lived in Southern Idaho, for instance, and his children lived in St. Maries. It isn't conclusive, and yet it makes, in view of the fact as it now appears, that the plaintiff did live in St. Maries, and pretty close to the place, if it is to be construed as I think it fairly should be construed, it makes a partial admission.

Mr. WHITLA.—I call your Honor's attention to the fact that the complaints allege that they were living with the fathers in St. Maries at the time of the accident—Paragraph 3, "That on and some time prior to the first day of June the said Russell G. Moore was living with his father in the city of St. Maries, Idaho."

The COURT.—Of course the illustration of Southern Idaho is an extreme one. I would still have to submit the matter to the jury, as I would in the case of the plaintiff, as to whether or not the fact that the conditions there were open and notorious and the children played there, were known to the plaintiff. But it presents a very peculiar situation. What is your suggestion? What is your motion? What do you desire to do?

Mr. PLUMMER.—I wish to eliminate any language from paragraph eight which could be construed as intending to mean that the plaintiff himself knew of the dangerous condition of these premises, or that the children where there; in other words, I

can add thereto, "excepting that the plaintiff did not know of such dangerous condition, or that his son frequently played there." I can add that to it.

Mr. McFARLAND.—We shall certainly object to that amendment; it comes too late. [153]

The COURT.—I think I shall do this: I shall permit you to do this, upon these conditions: You may strike out entirely the words in the eighth paragraph "was open and notorious up to the time of the death of Russell G. Moore and," upon the condition that if the verdict should be in favor of the plaintiff and the defendant shall thereupon make a showing that they produced proof contrary to the implication of this language, that a new trial will be granted, and that, in case a new trial is granted, that you pay the costs of this trial.

Mr. PLUMMER.—All right.

Mr. McFARLAND.—We except, if the Court please.

Mr. PLUMMER.—That would apply, of course, in both cases?

The COURT.—Yes.

Mr. PLUMMER.—I would now like to recall Mr. Thompson.

The COURT.—Do you accept those conditions?

Mr. PLUMMER.—Yes, we accept those conditions, your Honor.



**[Testimony of O. J. Thompson, for Plaintiffs  
(Recalled).]**

O. J. THOMPSON, heretofore duly called and sworn on behalf of plaintiffs, upon being recalled, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. Prior to the time of your son's death did you know anything about the condition of these premises upon which he was drowned?      A. No, sir.

Mr. McFARLAND.—If the Court please, I wanted to make an objection to that before he answered. We object as irrelevant, incompetent and immaterial, and not pertinent to the issues.

The COURT.—Sustained. This would come in the [154] affirmative defense, gentlemen.

Mr. PLUMMER.—All right. That is all, then, Mr. Thompson. We rest.

Mr. McFARLAND.—If the Court please, we have a motion to make.

The COURT.—Gentlemen of the jury, you may retire and remain about the building subject to call, that is, you can go to your jury-room, or anywhere.

(Jury retired from courtroom.)

**[Motion for a Nonsuit, etc.]**

Mr. McFARLAND.—The plaintiffs having rested their case, and having announced in open court that they have no other or further testimony to introduce or offer at this time, now comes the defendant and moves the Court for a nonsuit, and that a judgment



of nonsuit be granted herein in favor of the defendant and against plaintiff in each and both of said cases, upon the grounds and for the reason, first, that the evidence is insufficient to warrant or justify a verdict in favor of the plaintiffs or either of them against said defendant; second, that the evidence is insufficient to warrant or justify the Court in submitting said cases or either of them to the jury; third, that the testimony in each case fails to prove any negligence on the part of the defendant, or that the boys mentioned in the complaint herein, or either of them, was drowned or killed by, through, or on account of any carelessness or negligence on the part of the defendant; fourth, that the complaints and evidence in each case shows that the plaintiff in each case was guilty of contributory negligence in permitting his son to visit and play in and about said sawdust pile, pools, holes, or wells of water; fifth, that it [155] has not been proven by the testimony in either case that the pool, hole, cistern or well was attractive or inviting to children; sixth, that it has not been proven or shown by the testimony that the alleged attractiveness or attractiveness, or the alleged inviting condition, or inviting condition, of the sawdust pile was the proximate cause of the death of said children, or either of them.

(Said motion was thereupon argued by counsel for the respective parties.)

The COURT.—Gentlemen, the difficulty here is with the pleading more than with the facts. I think I shall overrule the motion. You may have your exception.

Mr. McFARLAND.—We except, if the Court please. Your Honor, it is past the noon hour now, and by the time we get our lunch it will be after one o'clock, and we would like to consult with some of our witnesses. Could your Honor give us a little additional time? The evidence for the defense will be brief anyway; it will be short, and I think we can—

The COURT.—If you will complete the case during the afternoon session.

Mr. McFARLAND.—I think so. I don't think there will be any doubt about it.

The COURT.—We will try to complete it this afternoon. You may have until 2:15.

Adjournment taken until 2:15 P. M. [156]

2:15 P. M.

**[Testimony of William Schmidt, for Defendant.]**

(Mr. McFarland made statement to jury.)

WILLIAM SCHMIDT, duly called and sworn as a witness on behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. HEITMAN.)

Q. Mr. Schmidt, state your name.

A. William Schmidt.

Q. Your residence and occupation.

A. William Schmidt, Plummer, Idaho; lumberman, is my occupation.

Q. Are you the William Schmidt that had a contract with the Coeur d'Alene Lumber Company in September, 1907? A. Yes, sir.

Q. And you and your brother were operating a sawmill at St. Maries? A. Yes, sir.

(Testimony of William Schmidt.)

Q. Will you kindly look at this instrument marked Defendant's Exhibit No. 1 for identification, and state— A. Yes, sir.

Q. Is that the contract? A. Yes, sir.

Q. Did you and your brother sign that?

A. Yes, sir.

Q. Is that the signature of Mr. Carroll, the manager of the Coeur d'Alene Lumber Company?

A. Yes, sir.

Mr. HEITMAN.—We offer that in evidence.

Mr. PLUMMER.—We object to it on the ground that [157] it is incompetent, irrelevant and immaterial, and does not prove or tend to prove any defense in this action, and that the answer shows that they removed their mill from there in October, 1908.

The COURT.—Overruled.

(Said contract was thereupon marked Defendant's Exhibit No. 1.)

Mr. PLUMMER.—An exception.

The COURT.—Exceptions will be deemed taken to all rulings.

Mr. PLUMMER.—All right, then.

Mr. McFARLAND.—That applies to both sides?

The COURT.—Yes.

### **Defendant's Exhibit No. 1.**

#### **"MEMORANDUM OF AGREEMENT.**

This contract and agreement made and entered into this fourteenth day of September, 1907, by and between the COEUR D'ALENE LUMBER COMPANY, a corporation organized in the State of Washington, and with its principal place of business

in the State of Idaho, at Coeur d'Alene City, Kootenai County, Idaho, party of the first part, and SCHMIDT BROTHERS, a co-partnership consisting of WILLIAM SCHMIDT and EDWARD SCHMIDT, of Missoula, Montana, parties of the second part, WITNESSETH:

That in consideration of the premises hereof, and the covenants hereinafter contained, the parties to this contract do hereby contract and agree as follows:

That the parties of the second part will saw and manufacture into timbers and merchantable lumber all logs now put or to be put on the skidways at Saint Maries, Idaho, said logs to be furnished to the parties of the second part by the party of the first part, at such skidways, and to be cut from Fractional Section twenty-seven [158] (27) Township forty-six (46) North Range Two (2) West of Boise Meridian. And it is agreed that should the skidways running direct to the carriage should at any time be filled with logs, the first party shall use the adjoining skidways and shall not be required to place all of the logs on the skidway running direct to the carriage.

The party of the first part shall pay to the party of the second part the following prices per thousand feet, board measure, for such timbers and merchantable lumber:

For planks 2 by 6 and wider and timbers 4 by 4 and larger, per thousand feet.....\$3.00

For 2 by 4's, 1 inch,  $1\frac{1}{4}$  inch,  $1\frac{1}{2}$  inch and  $1\frac{3}{4}$  inch, per thousand feet..... 3.50

The party of the second part shall saw all merchantable timber on said land whether it is green,



or dead timber that can be used, eight (8) inches or over, at the top, excepting white and black pine which shall be cut down to six (6) inches at the top.

The prices above mentioned to be paid shall include the piling by the party of the second part in piles at the mill assorted in different lengths and widths.

The party of the first part agrees to receive any common board down to size 1 by 6 and eight (8) feet long, and any No. 1 or No. 2, Clears, White, Yellow, or Black Pine, down to the size of 1 by 4 and six (6) feet long. The above timbers and lumber are to be cut in lengths of from six (6) to twenty-eight (28) feet; but if the party of the first part directs that any timbers shall be cut longer than twenty-eight (28) feet an additional price for such additional length shall be agreed on by the parties hereto.

The parties of the second part agree that they will begin the work of manufacturing said timbers and merchantable lumber [159] by the fifteenth day of October, 1907, if it is possible for them to have their mill set up by that time, and to operate the same continuously until all the said timber is cut out; and they further agree not to cut for anyone else and that they will conscientiously and faithfully do all that they should do towards an actual and bona fide completion of this contract, acts of God, riots, strikes, or stress of weather alone stopping the operation of this agreement.

The parties of the second part agree to manufacture good merchantable lumber, trimmed and evened up well, and not sawed more than two (2) inches



above the lengths specified, except it be timbers, and then only when there is no objection made by the company or party which the first party furnishes such timbers to.

The second parties agree to install a trimmer into their mill as soon as they can purchase one, and all boards and small dimension lumber that can be, are to be run over the trimmer.

The lumber and timbers are to be sawed at all times under the direction of the first party or its agent or manager, and in such sizes and dimensions as the first party, its agent or manager, may direct. The second parties agree to hire a good sawyer who is capable of and will saw out of all the logs all the Clear and Shop lumber, No. 1 and No. 2, that it is possible to cut from the logs, and there shall be no grade inferior to what is known as No. 5 Common. Should there be any Cull lumber the parties hereto shall agree upon a price for the sawing of such Cull lumber. The second parties agree to saw all lumber with solid-tooth saws.

The parties hereto agree to hire a man whose duty it shall be to check and keep account of the lumber and timbers as taken by the mill by the first parties, and to furnish each party [160] with a statement or inventory of each load. The wages of such man shall be paid jointly and equally by the parties hereto. Should either party become dissatisfied with such man he may be discharged and another agreed upon, and if the second man should become unsatisfactory to either party he may also be discharged and each party hereto may then hire its own man to perform

such services, and such men shall compare their statements and accounts.

The party of the first part agrees to remove the timber and lumber from the mill as it is cut so the party of the second part will not be inconvenienced in piling the lumber, except that if the party of the first part should want some timbers piled in a solid pile, so as not to be in the way of timber sawed, in an amount of three or four carloads, the parties of the second part agree to do the same. If any of the timbers so piled are not removed before the last day of the month they are to be counted and checked, as nearly as possible, and a statement furnished to both parties, and the second parties are to be advanced \$2.50 per thousand feet on all such timbers, and the balance between \$2.50 and the contract price shall be paid them when the timbers are removed. Such timbers or planks shall not remain so piled longer than sixty (60) days, and shall be at the risk of the party of the first part in case of fire.

Logs to the amount of the capacity of the mill of the second parties or not less than 120,000 feet per week, shall be furnished to the second parties by the first parties, but if the condition of the weather by reason of a snow blockade or other similar occurrence makes it impossible for such an amount of logs to be furnished, then the second parties agree to stop sawing for a few weeks until the first parties can have sufficient logs on skids at the mill to keep the mill running. But it is expressly [161] understood and agreed by and between the parties hereto that the parties of the second part in entering into

this contract do so with the understanding that the first party shall keep the second party supplied with sufficient logs to keep their mill running until all the timber on the above described land is sawed.

The first party agrees to clean off sufficient ground, clear of all brush, timber and rubbish, to be used by the second parties for the piling of slabs as herein-after mentioned.

The party of the first part agrees to pay to the parties of the second part fifty (50) cents per cord for all slabs cut into four foot lengths and piled in piles eight (8) feet high and ricked up closely together, such piles to have a space of not less than twenty (20) inches in between the piles. Such piles shall be 200 feet or more away from the mill or any lumber piles. If the first party desires to haul slabs direct from the mill it shall furnish wagons with racks at the mill and the second party shall load slabs on the wagons in such a manner that the slabs can be measured by the person who is checking the lumber, and the second party is to receive the same price, 50 cents per cord, loaded on wagons.

It is understood and agreed by and between the parties hereto that the second party is to be paid on the 10th of every month for all timbers and merchantable lumber received by the party of the first part during the next preceding calendar month, and all such payments shall be made at Saint Maries, Idaho. All advancements of \$2.50 per thousand for timber piled at the mill as hereinbefore specified shall be deducted from the next succeeding payment.

The first party agrees to furnish to the second

party all necessary fuel such as trimmings, cut-off blocks and slabs, to run their boilers, and also to furnish the second parties the edgings and cut-off blocks necessary for fuel for their cook-house, bunk-houses and office. [162]

It is agreed by the second parties that they shall give no orders to any person on the first party for wages or supplies, and they further agree and bind themselves to hold the first party harmless from any liens or other incumbrances.

IN WITNESS WHEREOF THE PARTIES HERETO have hereunto set their hands and seal this 14th day of September, at Missoula, Montana, A. D. 1907.

COEUR D'ALENE LUMBER CO.

By J. T. CARROLL,

General Manager.

SCHMIDT BROS.

By ED. SCHMIDT.

WILLIAM SCHMIDT.

Witnessed:

E. C. MULRONEY.

Executed in Duplicate.

State of Montana,  
County of Missoula.

On this 14th day of September, 1907, before me, Edward C. Mulroney, a Notary Public in and for Missoula County, State of Montana, personally appeared J. T. Carroll, General Manager of the Coeur d'Alene Lumber Co., a corporation, and acknowledged to me that said corporation executed the same, and at the same time personally appeared before me



(Testimony of William Schmidt.)

Ed. Schmidt and William Schmidt, comprising the copartnership of Schmidt Bros., and acknowledged to me that they executed the foregoing agreement.

[Seal]                      EDWARD C. MULRONEY,  
Notary Public in and for Missoula County, State of  
Montana." [163]

Q. Mr. Schmidt, will you state what, if anything, you and your brother did under your contract?

Mr. PLUMMER.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

A. What was the question?

Mr. HEITMAN.—Read him the question.

Q. (Last question read.)

A. We carried out the contract.

Q. Well, what did you do then in the way of building the mill on this land?      A. We built the mill.

Q. Whose mill was that?

Mr. PLUMMER.—The same objection.

The COURT.—Yes.

A. Our own.

Q. The mill belonged to you?      A. Yes, sir.

Q. No part of it belonged to the Coeur d'Alene Lumber Co.?      A. No, sir.

Q. It had no interest in the mill?      A. No, sir.

Q. What if anything did you do in the way of sawing timbers into lumber under this contract?

A. We sawed out about 6,000,000 feet there.

Q. How long did you operate your own mill at that place under this contract?

A. It was in operation about a year.



(Testimony of William Schmidt.)

Q. You began operating about when?

A. About the first of November, 1907.

Q. About the first of November, 1907?

A. Yes, sir. [164]

Q. Now, in operating that mill who employed your men?     A. We employed our own.

Q. You employed your own men?     A. Yes, sir.

Q. Hired them and discharged them?

A. Yes, sir.

Q. And paid them?     A. Yes, sir.

Q. And had full and absolute—

Mr. PLUMMER.—Don't lead him, Mr. Heitman.

Mr. HEITMAN.—I wouldn't, but you set such a pernicious example. I thought we were trying to get through.

Q. Well, you may state then who paid the men that were employed by you in your mill.

A. We paid them.

Q. The Coeur d'Alene Lumber Company had nothing to do with the payment of their wages?

A. No, sir.

Q. Where did you get the water for operating your mill?

A. We got it out of a hole in the bottom there.

Q. You say in the bottom. What sort of a place was that bottom?

A. Well, there was a low—there was a draw running through there, a creek, and a spring to the creek.

Q. You may state whether or not there was a spring anywhere near there.

(Testimony of William Schmidt.)

A. Yes, sir, there was a spring where we got the water. [165]

Q. State whether or not that spring was perpetual.

A. Yes, sir, it was.

Q. Ran the whole year? A. Yes, sir.

Q. Now, where with reference to this spring did you dig your hole? A. Right in the spring.

Q. Who individually dug that hole? Who did you hire? Which one of your employees dug it?

A. I couldn't say which one; I might have worked there myself at times.

Q. About how deep and wide was that hole?

A. Well, it was about five feet deep, and about—oh, I should judge four and a half feet wide, something like that.

Q. Four and a half feet wide? A. Yes, sir.

Q. Speak up a little louder so that the jurors can hear you. A. All right.

Q. Where did the water come from that filled those holes? A. It come from the bottom of that hole.

Q. From the spring?

A. From the spring; the spring was right in the bottom of the hole.

Q. The spring was in the bottom of the hole?

A. Yes, sir.

Q. Was there any method by which the water from those holes, bubbling up from that spring, was drawn away from that place?

A. Yes, sir, it was drained.

Q. Well, what was it?

A. There was a drain put through there. [166]

(Testimony of William Schmidt.)

Q. What sort of a drain?

A. A box. I don't remember the exact size of the box.

Q. A wooden box? A. Yes, a wooden box.

Q. And about how long was that drain?

Mr. PLUMMER.—If the Court please, we object to this question and this line of testimony. Under their pleadings, they allege there wasn't any well there at all, that it was just a pond, and as their whole defense is based upon the theory of it being a pond and not a well at all, I don't think they ought to be allowed to prove about some well that the water was drained out of at some time, provision made to drain it.

The COURT.—Overruled.

Mr. HEITMAN.—We will prove there was a pond there and the boys were drowned.

Q. About how long was that drain?

A. It was about forty feet, I would judge.

Q. About forty feet down the bottom or little valley?

A. It may have been a little longer than that; I don't just remember.

Q. What was the condition of the water, that is, as to its depth, while you remained there operating that mill?

A. Why, the holes would get full if we shut the mill down for a day or so, the holes would fill up.

Q. State what would become of the water.

A. That overflowed on through the drain.

Q. Overflowed through the drain? A. Yes, sir.

(Testimony of William Schmidt.)

Q. And there was then just the water standing there in the well? [167] A. That was all.

Q. Up to the surface of the well? A. Yes, sir.

Q. Up to the top of it? A. Yes, sir.

Q. How were those wells constructed with reference to curbing, if any? A. They were curbed.

Q. Well, in what manner?

A. At the bottom the curbing drove in straight up and down; around the sides it was laying flat.

Q. What sort of curbing was that?

A. Plank, two-inch plank.

Q. Two-inch plank? A. Yes, sir.

Q. State whether or not those planks projected above the top of the well.

A. Well, they were just about even with the top of the well.

Q. Just about even with the ground around the well? A. Yes, sir.

Q. State whether or not those wells were covered, or that well was covered.

Mr. PLUMMER.—We object to that as incompetent, irrelevant and immaterial. If your Honor please, just on that point I want to call the Court's attention to paragraph six of their answer in this case: "In answer to paragraph eight of said complaint, defendant denies that the alleged dangerous or any condition of said premises, or the danger of small children falling into said alleged well or cistern or becoming drowned, or the habitual use of said premises by said Bernarr Thompson [168] or other companions or children of tender years, or of

(Testimony of William Schmidt.)

any years, was open or notorious up to the time—" That wasn't the paragraph I wanted to read. Paragraph seven: "That in answer to paragraph nine of said complaint, defendant denies that on, to wit, June 1st, 1911, or at any other time, said Bernarr Thompson, in company with other children, playing in about or upon said premises, or close to or in the immediate vicinity of said alleged well or cistern, which it is alleged at said time was filled on a level with the ground with water, or otherwise, or at all, or said Bernarr Thompson, while playing thereon or thereabout, accidentally or inadvertently fell into said well or cistern or was drowned, and denies that said Bernarr Thompson at any time or under any circumstances, or at all, fell into any well or cistern upon the premises of defendant."

Then in paragraph two of the affirmative defense, being paragraph six of the amended answer, they say: "That in the operation of said sawmill by said Schmidt Brothers, and without the knowledge of defendant, sawdust accumulated in piles adjacent to said sawmill; that back of said sawmill there was and is a small ravine, through which water flowed, and which sloped from the hillside toward the mill site of said Schmidt Brothers and terminated at the said piles of sawdust into a small pond or sink; that said pond so formed as aforesaid was about twenty-five or thirty feet long, by about twelve or fifteen feet wide; and at all of the times herein mentioned remained open, unenclosed and uncovered, and was and is off and out of the way of any public highway, road,



(Testimony of William Schmidt.)

street or alley; that said pond [169] was formed and caused by said Schmidt Brothers in leaving upon said mill site, viz., said northeast quarter of the northeast quarter, as aforesaid, piles of sawdust against which the waters in said ravine flowed, stood and remained. That if said Schmidt Brothers dug or left upon said premises any hole, well or cistern, defendant had no knowledge thereof.

In paragraph one of the second separate defense they say: "That at all of the times mentioned in said complaint and herein mentioned, plaintiff knew of the existence of said pond or sink."

The Court can see that the whole theory of the defense is there, that there was no well dug there in the first place, and they allege that it was left open and notorious at all times. Now, they can't go to work and prove that they covered it up, as an afterthought, in defense. We are taken entirely by surprise. There is no such defense proved. They are now trying to prove an avoidance as against a practical denial of any well there at all, and against the allegation that it was at all times open and uncovered.

The COURT.—This comes in under the general issue, gentlemen. You allege the excavation of a well, and that the defendant left it uncovered. This they deny expressly. This comes in under the general issue.

Mr. PLUMMER.—But afterwards they plead affirmatively that it was left uncovered.

The COURT.—Well, that the pool was left uncovered, but not the well.

(Testimony of William Schmidt.)

Q. (Last question read.)      A. They were.

Q. How were they covered? [170]

A. With two-inch planks.

Q. Well, just tell what you did when you covered them.

A. Just covered them over and fastened the cover down.

Q. How did you fasten the cover down?

A. With nails, spikes.

Q. What did you nail the planks to?

A. It was fastened on to the curbing.

Q. The curbing that projected up?      A. Yes, sir.

Q. State whether or not those wells or holes were kept covered by you in this manner during all the time you remained there.      A. They were.

Q. State whether or not this covering was on these wells when you left those premises?

A. They were.

Q. And when did you leave; when did you move your mill away?      A. I think it was in 1910.

Q. About what time in 1910?

Mr. WHITLA.—We object to that as incompetent, irrelevant and immaterial, for the reason that they allege in their answer specifically that they left there in the month of October, 1908. "That some time in the month of October, A. D. 1908, the exact date of which is unknown to defendant, said Schmidt Brothers ceased operating said sawmill and removed the same and all of their property constituting the sawmill plant from said premises, but left thereon remaining said piles of sawdust and pond or sink."

(Testimony of William Schmidt.)

Mr. McFARLAND.—That is a clerical error.

Mr. PLUMMER.—It is the same thing in the first answer.

Mr. McFARLAND.—We ask leave to amend that date. That is a matter, if the Court please, that can't take the plaintiff by surprise, as to the time they left there. [171]

Mr. WHITLA.—It certainly does, your Honor, because we were relying absolutely upon these premises being in the possession of the defendant, without the Schmidt Brothers having anything to do with it, for about three years prior to this time. Mr. Schmidt has already testified that they were only there about a year.

Mr. HEITMAN.—He said sawing lumber for about a year.

Mr. McFARLAND.—If the Court please, the mistake was made in drafting the original answer, and when I came to amend the answer I simply took my office copy and wrote in the amendments that I desired to appear in the amended answer, and the stenographer, in copying it, and myself, overlooked that date, that is all there is to that; it is simply a clerical error, and it is one, as I said before, that can't take them by surprise. They must have known when the Schmidt Brothers moved that mill away. How can it take them by surprise?

Mr. PLUMMER.—We didn't prepare any proof on that subject. We didn't ask anybody particularly as to when they left there. It is admitted about when they left. We supposed they left there as they

(Testimony of William Schmidt.)

alleged in their answer. We were wholly relying upon that. Now to change the whole thing by claiming an alleged clerical error—

The COURT.—I cannot see how it is very material when they left there. You may ask him how long this hole or well, whatever you call it, was left covered. It seems to me that is the only material question.

Q. How long, to your knowledge, Mr. Schmidt, did this well or hole remain covered?

A. It was covered when we left there in 1910; that is as far as I know.

Q. What time in 1910?

A. I think it was July. [172]

Q. It was covered at that time? A. Yes, sir.

Q. It was nailed down? A. Yes, sir.

Q. The planks nailed down?

Mr. PLUMMER.—We object to it as leading.

The COURT.—Yes; don't lead the witness.

Q. While you were there, state whether or not this drain existed, that is, was the drain there when you left?

A. I guess it was; the water kept on going through.

Q. The drain up to the time you left drew the water from these holes? A. Yes, sir.

Mr. WHITLA.—We object to that because of the fact that they allege that ever since they left there this was a pond or sink, and the water did remain there open and uncovered all the time; they allege that there was a pond or sink there, and that it remained there all of those times uncovered, and now



(Testimony of William Schmidt.)

they try to prove that it wasn't there, and was covered up until 1910. That was their affirmative answer.

Mr. McFARLAND.—Our denials cover everything with reference to those wells being uncovered.

Mr. WHITLA.—Paragraph two is certainly inconsistent with this testimony attempted to be introduced here at this time, and takes us entirely by surprise. We aren't prepared to meet it, and had no knowledge or means of finding out that they were going to set up any such facts at all. Paragraph two: "That said pond so formed as aforesaid, was about twenty-five or thirty feet long, by [173] about twelve or fifteen feet wide; and at all of the times herein mentioned remained open, unenclosed and uncovered." They then go ahead and allege that Schmidt Brothers left there in 1908, that at that time this ravine was blocked by the sawdust across the same, and that this pond was caused thereby, and remained ever since that time there open and unenclosed. Now, they are trying to introduce the defense that Schmidt Brothers didn't leave there until 1910, and that at that time the drain drained the water away from this well, and that the well was covered, making altogether a different state of facts from those which they have pleaded, and misleading the plaintiff here, in that we didn't bring any testimony to rebut anything of that kind with. It isn't a defense pleaded at all. It shows clearly as an afterthought.

Mr. HEITMAN.—If the Court please, in para-



(Testimony of William Schmidt.)

graph four of their complaint they charge the defendant: "That the defendant caused, as part of said plant, to be excavated and dug a certain cistern or well." And in paragraph five they say: "That some months prior to the 1st day of June, 1911, the defendant caused all of said buildings, machinery and appliances to be moved off of said lands, but carelessly and negligently failed to fill up or cover up said well or excavation." They don't confine their description of it to a cistern or well, but they say an "excavation," and carelessly, negligently and recklessly permitted said well or cistern to remain open up to and including the time—" Now, in our answer we deny that, under the specific denials, and it comes in under the general denials, and deny that it was left open or uncovered at any time, that it was a cistern or well or an excavation. Now, it does strike me that counsel who have through all this trial been so strenuously insisting upon amendments in their [174] own behalf, in which they contradicted the original pleadings, should not be so suddenly taken by surprise when we ask for the introduction of evidence.

Mr. WHITLA.—Your Honor can see now from the statement made by counsel why it is that our objection is well taken to the covering of this in 1908. They want to go back to 1908 and say that it was then covered when they have specifically averred in their answer that it was uncovered at that time. There was nothing in our complaint alleging that it was covered in 1908 or any of those times, and they come in and want to say that it was covered then, in spite of

(Testimony of William Schmidt.)

the fact that their affirmative answer definitely alleges that on October, 1908, this pond remained open and unenclosed. There is no allegation in our complaint that it was open and unenclosed in 1908, so their denial doesn't help them on that, yet they are trying to put in testimony that it remained closed until 1910, after they have alleged that it remained open since 1908.

Mr. PLUMMER.—The reason they allege in that answer that this was left uncovered, open and unenclosed was for the purpose of charging us with assumption of risk. They further say that the parents knew all about it. They come in now and try to prove that it was absolutely covered up. If that is true then of course their defense of assumption of risk is destroyed. The whole theory of their answer is this: That this was a pond or lake, open and notorious, and left there by Schmidt Brothers, because they are independent contractors, and therefore the company is not liable. That is the theory of their whole defense from beginning to end.

The COURT.—You allege here in paragraph five that some months prior to the first day of June, 1911, the defendant caused all the buildings, machinery and appliances to be moved off, and when they [175] moved off they left this uncovered. Now they deny that.

Mr. PLUMMER.—Of course they deny that they didn't do it negligently or on that day.

The COURT.—They deny that they did it at all.

Mr. WHITLA.—Then they specifically allege the

(Testimony of William Schmidt.)

time at which it was done.

The COURT.—Let us get along in an orderly way. I don't care to enter into an argument with counsel. You have alleged that they left some months prior to this. Apparently both sides have pleaded very carelessly in this case. I think I shall have to let this evidence go in under this general issue raised by your statement that they left some months prior, and took the buildings off, and left this open. Now they deny that. That presents an issue.

(Last question and answer read.)

Q. At that time, Mr. Schmidt, state whether or not there was any water at that point outside of these wells, except what was running through the drain.

A. No, sir, I think not.

Q. Are you acquainted with Mr. O. J. Thompson?

A. Yes, sir.

Q. The plaintiff in this case? A. Yes, sir.

Q. You knew him at St. Maries? A. Yes, sir.

Q. State whether or not to your knowledge while you were operating your mill at that place he ever visited it.

A. I have seen him there, yes, sir.

Q. How many times have you seen him there?

A. I couldn't say just how many times I have seen him there; I know he has been there. [176]

Q. Was he there more than once?

A. Well, I would say he was, yes, sir.

Mr. PLUMMER.—What is that?

A. Yes, sir, I would say he was.

Mr. HEITMAN.—You may inquire.

(Testimony of William Schmidt.)

Cross-examination.

(By Mr. PLUMMER.)

Q. Who was bossing the job there for the Coeur d'Alene Lumber Company?     A. Freeman.

Q. Who is Freeman?

A. He was working for the company.

Q. Well, what official position did he hold with the Coeur d'Alene Lumber Company.

Mr. McFARLAND.—I object, because it hasn't been shown that he knows.

Mr. PLUMMER.—He is a contractor; he ought to know.

The COURT.—He may answer if he knows.

A. He was there checking that lumber, looking after that lumber.

Q. How long a time did you run that mill, did you say?     A. About a year.

Q. Did you cut all the available timber close to the mill?

A. All the timber on that section, yes, sir.

Q. All that you could get to handily from that particular place where you were running the mill?

A. All that the company wanted to put in there.

Q. What is that?

A. All our contract called for.

Q. Your contract didn't call for any number of feet, did it? [177]

A. Called for all the timber on that section.

Q. They just had one section of land there?

A. Yes, sir.

Q. When did you nail these planks over this well?



(Testimony of William Schmidt.)

A. Right after it was dug.

Q. Right after it was dug?      A. Yes, sir.

Q. Two-inch plank?      A. Yes, sir.

Q. What sized boards was the curbing composed of?      A. Two-inch plank.

Q. How big spikes did you use to nail down the top planks?

A. I don't remember the size of the spikes.

Q. They were good big spikes, were they?

A. Fairly heavy, yes.

Q. How many did you put in each plank?

A. I suppose we put in two; we usually put in two.

Q. Did you nail them down yourself?

A. Yes, sir.

Q. Who did?      A. I don't recall.

Q. Did you see it done?

A. I saw it after it was done.

Q. In order to get those planks out you would have to take a crowbar to pry them out, wouldn't you?

A. Yes, sir, I think so.

Q. They were nailed down good and secure?

A. Yes, sir.

Q. Everything all covered up?

A. Yes, sir. [178]

Q. You couldn't see any water around there at all after it was covered up?      A. No, sir.

Q. It remained in that condition all the time, did it?      A. Yes, sir.

Q. How many wells did you cover up?      A. Two.

Q. How close together were they?

A. About eighteen inches apart.



(Testimony of William Schmidt.)

Q. There was another well just above these other two wells about 50 or 60 feet, wasn't there?

A. Yes, sir.

Q. You didn't cover that up, did you?

A. No, sir.

Q. Why? A. I had nothing to do with that.

Q. It was right close to these other wells, wasn't it? A. Yes, sir.

Q. Why did you cover up these two wells?

A. To keep stock out of them.

Q. To keep stock out? A. Yes, sir.

Q. Why didn't you cover the other up?

A. I had nothing to do with it.

Q. Was you given a certain amount of ground there that you had to do with, and nothing else?

A. No, sir; I used water out of one well, and had nothing to do with the other.

Q. Did you say you covered up these two wells you happened to be using water out of— [179]

A. Yes, sir.

Q. —so as to keep stock out? A. Yes, sir.

Q. You were in charge of all the premises there, weren't you? A. No, sir.

Q. I mean immediately surrounding your mill.

A. No, sir.

Q. You didn't have access and control over the land immediately about your mill there?

A. I could go there, yes, sir.

Q. You could use it, couldn't you?

A. I could if I wanted to.

Q. Then I ask you again why you didn't cover up

(Testimony of William Schmidt.)

the other well to keep the stock out of that?

A. I had no use for that at all.

Q. You wanted to keep the stock out of the well, didn't you?

A. I didn't have anything to do with the other well.

Q. The reason you covered up these other wells was to keep the stock out?

The COURT.—If he didn't dig it and had no responsibility with regard to it, you can't ask him further with regard to it. He simply said he didn't have anything to do with it.

Mr. PLUMMER.—I am trying to show that he didn't cover up any of these wells. I want to know what the reason was.

The COURT.—If you show that he dug the other well, or had anything to do with it, you may make that argument, but it doesn't appear that he had anything to do with the other well. [180]

Q. Did you dig more than one well there?

A. I dug those two right together there.

Q. Did the water rise up in both of them?

A. No, sir.

Q. Did you cover both wells the same way?

A. Yes, sir.

Q. Throw any dirt or anything over them?

A. No, sir.

Q. That is the way they were when you left there?

A. Yes, sir.

Q. How long was it after you dug the first well before you dug the second well?

(Testimony of William Schmidt.)

A. I dug the first well in November and the next one I think some time in August.

Q. Did you cover them both up at the same time?

A. No, sir.

Q. When did you cover the first one up?

A. Right after I dug it.

Q. And you covered the next one up after you dug that?     A. Yes, sir.

Q. What was Thompson doing up there when you saw him?     A. Just looking on.

Q. Just looking on?     A. Yes, sir.

Q. When was this you saw him there?

A. Why, it was in the fall when we first got started.

Q. That was 1907?

A. Well, late in the fall, yes, sir.

Q. Before you dug these wells?

A. One of them was there. [181]

Q. Covered up?     A. Yes, sir.

Mr. PLUMMER.—That is all.

Redirect Examination.

(By Mr. HEITMAN.)

Q. Who is this man Freeman that you say was there representing the Coeur d'Alene Lumber Company? What were his duties?

A. He just looked after the sawing there.

Q. What did he do in connection with looking after the sawing?

A. Well, if stuff didn't get out of there in the right shape he would come in there to see us about it.

(Testimony of William Schmidt.)

Q. Well, can't you explain a little more fully what his duties were?

A. Why, he looked after the yard, looked after the piling.

Q. Checking up the lumber?

Q. Had nothing to do with—

Mr. PLUMMER.—We object to that as leading.  
The COURT.—Yes.

Q. State whether or not he had anything to do with operating the mill.

A. No, he had nothing to do with operating the mill.

Q. State whether or not he had anything to do with furnishing statements or inventories of loads of lumber?

A. We furnished statements at the end of the month, yes, sir.

Q. He was the only man representing the Coeur d'Alene Lumber Company there at the mill?

A. Yes, sir; Mr. Hunt was there in the first place, when we first started up. [182]

Q. When you first started up? A. Yes, sir.

Q. What was Mr. Hunt doing?

A. He was just looking after things in general there.

Q. Well, what was he doing?

Mr. PLUMMER.—I think he has answered it—looking after things in general.

Q. State whether or not he had anything to do with operating your mill. A. No, sir.

Q. State whether or not he had anything to do

(Testimony of William Schmidt.)

with hiring your hands?     A. No, sir.

Q. Or paying them?     A. No, sir.

Q. Do you know for what purpose this well that was 60 or 100 feet from the wells you dug was used?

Mr. PLUMMER.—We object. He said he didn't use it at all.

Mr. HEITMAN.—I didn't ask him if he used it. I asked him if he knew for what it was used.

A. Yes, sir; the Coeur d'Alene Lumber Company watered their horses there.

Q. Were they operating a logging camp there?

A. No, sir; the logging was contracted.

Q. And the contractors watered their horses at this place?

A. No, sir; they had horses working in the yard.

Q. Do you know about how deep that well was?

A. No, I do not.

Mr. HEITMAN.—That is all. [183]

Mr. PLUMMER.—Just one question.

Recross-examination.

(By Mr. PLUMMER.)

Q. Tell me again, will you, Mr. Schmidt, you say it was in the fall of 1907 that you put your mill there?

A. Yes, sir.

Q. And that Thompson was there when you put the mill there the first time?

A. I know he was there looking on after we got started.

Q. When did you get started?

A. Got started in November.

Q. In November, 1907?     A. Yes, sir.



(Testimony of William Schmidt.)

Q. You are sure he was there just after you got started?

A. I couldn't say the exact date when he was there.

Q. Well, some time in November?

A. I wouldn't say November or December; some time in the fall.

Q. Some time in the fall of 1907?      A. Yes, sir.

Q. Don't you know, sir, that Mr. Thompson didn't move to St. Maries, and was not even in the vicinity, or in that same country, until the 28th day of April, 1908?      A. No, sir.

Mr. PLUMMER.—That is all.

Redirect Examination.

(By Mr. HEITMAN.)

Q. When did you say he was there?

A. I said he was there in the fall.

Q. What year?      A. 1907.

Mr. HEITMAN.—That is all. [184]

**[Testimony of Edward Schmidt, for Defendant.]**

EDWARD SCHMIDT, duly called and sworn as a witness on behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. HEITMAN.)

Q. Mr. Schmidt, state your name, residence and occupation.

A. Edward Schmidt; I live at Plummer; lumberman and farmer.

Q. Are you a member of the firm of William

(Testimony of Edward Schmidt.)

Schmidt and Edward Schmidt? A. Yes, sir.

Q. Your firm had a contract with the Coeur d'Alene Lumber Company to saw some lumber at St. Maries in 1907? A. Yes, sir.

Mr. PLUMMER.—We admit, Mr. Heitman, that they signed that contract, and the company signed it, to save the time of reading it to this witness.

Q. About when, Mr. Schmidt, did you and your brother begin operating at St. Maries under that contract? A. About when, did you say?

Q. Yes.

A. We moved the mill in there about the first of October, commenced setting it up.

Q. What year? A. 1907.

Q. Whose mill was that?

A. It belonged to my brother and myself.

Q. Did the Coeur d'Alene Lumber Company have any interest in it? A. No, sir.

Q. What did you and your brother do, if anything, under this written contract, in sawing up the lumber? [185] A. In sawing it up?

Q. Yes.

A. Why, we sawed the lumber under their instructions, according to their orders.

Q. About how long did that contract occupy you?

A. Just about one year.

Q. State whether or not, in constructing your own mill, or putting it into operation and operating it, you dug any holes or wells near it? A. We did.

Q. Well, what did you do?

A. We dug out a spring to create a reservoir for

(Testimony of Edward Schmidt.)

water supply for our boiler.

Q. How did you carry the water to the boiler?

A. Pipes, a steam jet.

Q. A pipe and a steam jet?      A. Yes, sir.

Q. About how large were those wells or holes?

A. Well, I would have to judge at it; I don't remember it exactly; it was about 4 by 5 or 4 by 6, the first one, and between four and five feet deep.

Q. State whether or not those wells were covered.

A. They were.

Q. What with?      A. With two-inch plank.

Q. How were they fastened, if at all?

A. Nailed. There was a curbing in the well, and the plank were fastened to that, the covering plank were fastened to the curbing.

Q. What was the size of the curbing? [186]

A. Two-inch plank at the top.

Q. How were these plank used for covering fastened to the curbing?      A. Nailed.

Q. How long did that fastening remain on the wells, to your knowledge?

A. As long as we were there.

Q. As long as you were there?      A. Yes, sir.

Q. About how far apart were these wells?

A. I would have to judge that; I would say between two and three feet.

Q. Between two and three feet?

A. Not over that, I don't believe.

Q. Both of the wells were covered?

A. Yes, sir.

(Testimony of Edward Schmidt.)

Q. State whether or not these wells were drained in any way.

A. The wells, from the bottom there was a drain in through the draw that would drain the water to a level with the top of the ground.

Q. What sort of a drain was this?

A. It was a wooden box.

Q. Extending from the top of the well?

A. From the top of the well down through in under the sawdust pile.

Q. Do you recall about how long this drain was?

A. No, I don't; it wasn't a great ways though.

Q. When did you remove your mill from this place? [187]

A. We removed the boiler and engine the following spring.

Q. The following spring?

A. Yes, sir; probably along—I don't remember the date either; it was the following spring.

Q. And how long did you yourself remain there?

A. We were there till early in January, 1909.

Q. Early in January, 1909?

A. Yes, sir, I think so. Just a moment—it was in January, 1910, that we moved away.

Q. When did you move the remainder of your mill property from that place? A. In August, 1910.

Q. August, 1910? A. Yes, sir.

Q. Will you state whether or not these wells were covered at that time? A. Yes, sir.

Q. Covered with these planks? A. Yes, sir.

Q. The same way? A. Yes, sir.

(Testimony of Edward Schmidt.)

Q. Was the drain open at that time?

A. I didn't look, but it was open in the spring; no water accumulated there.

Q. There was no accumulation of water outside the wells?     A. No, sir.

Q. Do you know Mr. O. J. Thompson, one of the plaintiffs in this case?     A. Yes, sir. [188]

Q. State whether or not while you were operating that mill at that place you ever saw him at the mill.

A. I have.

Q. About how many times?

A. I couldn't say how many times; I have seen him there once or twice.

Q. Do you know about when you saw him?

A. I don't recall, no, sir.

Mr. HEITMAN.—I believe you may inquire.

Cross-examination.

(By Mr. PLUMMER.)

Q. You are working for the Coeur d'Alene Lumber Company now?     A. No, sir.

Q. Is your brother who just testified before you?

A. No, sir.

Q. Have you been recently?     A. No, sir.

Q. Or your brother?     A. No, sir.

Q. What are you doing now?

A. We own a mill on Little Plummer Creek.

Q. At the town of Plummer?

A. Near the town of Plummer.

Q. You don't remember when you saw Thompson there at the mill?



(Testimony of Edward Schmidt.)

A. No, sir. It was while we were operating there.

Q. You only operated a year? A. Yes, sir.

Q. Commenced in the fall of 1907. Then you must have seen him there some time during the summer of 1908?

A. Some time during that time, or possibly during the fall of [189] 1907.

Q. What do you think about it? What is your best impression?

A. I have no recollection as to the time.

Q. What was he doing there?

A. Doing like a great many others—just looking on.

Q. How long did he stay?

A. Just to look around the mill.

Q. Had you known him before that time?

A. Had I known him?

Q. Yes.

A. I had met him and seen him around town.

Q. How long had you seen him around town before that time? A. I can't say that.

Q. Anybody with him?

A. Not that I remember.

Q. He was just standing looking on?

A. Yes, sir.

Q. Lots of others came and did the same thing, didn't they? A. Yes, sir.

Q. How did you happen to remember seeing him there four or five years ago?

A. Because there was so many others that done it right the same way.

(Testimony of Edward Schmidt.)

Q. That is the reason you remember him?

A. Yes, sir; and another thing, Mr. Thompson is one of the few men that I first—well, he was one of the first few men that my attention was called to.

Q. Your attention was called to?

A. Yes, sir; not in any particular way just, but just in a general way. [190]

Q. What is that?

A. I had met his brother, and it was in that way I remembered this Mr. Thompson.

Q. You remember seeing him there at the mill?

A. Yes, sir.

Mr. PLUMMER.—That is all.

Redirect Examination.

(By Mr. HEITMAN.)

Q. Mr. Thompson was selling newspapers around the city? A. Yes, sir.

Mr. HEITMAN.—That is all.

Mr. PLUMMER.—That is all.

**[Testimony of Charles Schmidt, for Defendant.]**

CHARLES SCHMIDT, called and sworn as a witness on behalf of defendant, testified as follows, on

Direct Examination

(By Mr. HEITMAN.)

Q. Mr. Schmidt, you may state your name, residence, and occupation.

A. Charles J. Schmidt, St. Maries, and I am now yard foreman for the Coeur d'Alene Lumber Company.

Q. You are a brother of William and Edward

(Testimony of Charles Schmidt.)

Schmidt?      A. Yes, sir.

Q. State whether or not you were at their mill when they were operating it at St. Maries.

A. I was.

Q. In what capacity were you working there?

[191]      A. I was running the trimmer.

Q. About when did you go there?

A. The last of October, 1907.

Q. How long did you remain there?

A. Till the job was finished.

Q. Well?

A. That was I think in October, 1908.

Q. State whether or not you remained there after they finished their contract.      A. I did.

Q. How long?

A. Till May the 17th, 1911, I think it was.

Q. And what were you doing there after your brothers finished their contract?

A. Part of the time I was working for the Coeur d'Alene Lumber Company driving a team.

Q. What were you hauling with a team?

A. Lumber, delivering around town.

Q. From that yard?      A. From the lower yard.

Q. From the lower yard?

A. Most of the time. Part of the time after they left up there I was hauling lumber from the upper yard down to the planer.

Q. About how far from this old mill site, this sawdust pile, did you live during that time?

A. Well, from the edge of the sawdust pile to my house was, I should judge, about 60 to 80 yards.

(Testimony of Charles Schmidt.)

Q. State whether or not you lived in the direction of the city.     A. Sir? [192]

Q. Did you live in the direction of the town?

A. No, sir; away from the town. Well, not exactly away from the town; it was just kind of—well, the town was north of the sawdust pile. I lived south-east.

Q. Do you know what the condition of that sawdust pile was when you left there in May, 1911?

A. Well, in regard to condition the fire left it in, I do.

Q. Well, state it.

A. It was burned full of holes; it had been burnt down the sides until there was a big high bank there, and there was big cracks in the sawdust pile where the fire had burnt the sawdust from underneath, which let it gap open.

Q. What was the color of the sawdust pile? How did it look?

A. Well, it was a kind of a dirty looking color.

Q. Do you know how that fire started?

A. Started from the forest fire.

Q. General forest fires of that summer?

A. Yes, sir.

Q. When did it catch on fire, if you can recall?

A. I think it was the 23d day of August.

Q. What year?     A. 1910.

Q. And continued burning all that winter?

A. All that winter, and a big part of the next summer.

Q. Now, in 1911 state whether or not you saw any

(Testimony of Charles Schmidt.)

fire in the sawdust.

A. I did in the early part of the year.

Q. Well, what time of the year?

A. Well, up to the time I left there, it was still afire. [193]

Q. What was the extent of the fire in the sawdust when you left there May 17th, 1911?

A. I couldn't say as to that, because it was all underneath; every once in a while you would see it burst out though.

Q. State whether or not you know anything about any well or pool of water surrounded by the sawdust?

A. Well, there was a reservoir there, but there was no pool of water *that* the time that I knew of it.

Q. Well, you say there was a reservoir; what was it? A. Supposed to be water in it.

Q. Do you know anything about any wells that your brother dug there, for the purpose of operating the mill?

A. Well, only what was told me; I never saw them dug.

Mr. PLUMMER.—I object to that.

Q. Did you see any wells there?

A. No, not the wells.

Q. What did you see?

Mr. PLUMMER.—We object as immaterial.

The COURT.—He may state what he saw, if anything.

A. I saw what I took to be wells, from the covering over them.

Q. Where was this reservoir that was there in May,



(Testimony of Charles Schmidt.)

1907, with reference to these what you took to be covered wells?     A. Well, that was them.

Q. What was the size of this reservoir in May, 1911, about what was the size?

A. Well, I couldn't say as to that.

Q. You couldn't say?

Mr. PLUMMER.—Well, if he can't say—

Q. While you were there, state whether or not you saw any [194] children around that sawdust pile.

A. I did.

Q. About how many did you see there?

A. Well, I couldn't state how many I saw there, but I have seen two and three and four at different times.

Q. What, if anything, did you do or say to them?

A. I ordered them off.

Q. What did you order them off for?

A. Because I knew the condition of the sawdust pile, and the danger they was in.

Q. What was the danger to the children in that sawdust pile?

A. They was in danger of falling down off the bank, and also falling in those holes that the fire had burnt underneath there.

Q. Did you know any of the children that you ordered away?

A. I knew Mr. Thompson's little boy.

Q. How many times did you order him away?

A. Twice.

Q. About when was it that you ordered the Thomp-

(Testimony of Charles Schmidt.)

son boy away the last time, how long before you left there?

A. Well, I couldn't say as to that because I never paid any attention to what time it was, but I know it was after the fire was there.

Q. What year was it when you ordered him away?

A. I think it was in the spring of 1911.

Q. Do you know about how far apart the times were? A. No, I do not.

Q. Do you know Mr. Thompson himself, Mr. O. J. Thompson? A. I do. [195]

Q. State whether or not you ever saw him around the sawdust pile or the mill and this reservoir.

A. I saw him around the mill.

Q. How many times did you see him there?

A. Well, I don't know. I saw him there once that I am positive of; he may have been there oftener; I may have seen him oftener, but—

Q. When did you see him? Can you locate the time?

A. Along some time in the summer of 1908?

Q. The summer of 1908? A. Yes.

Q. Now, do you know how, if at all, these wells that were covered were drained, that is, before the fire?

A. Well, the wells themselves, I don't know as they were drained.

Q. You don't know anything about that?

A. No.

Q. State whether or not there was any culvert leading down there.

(Testimony of Charles Schmidt.)

A. There was through underneath the sawdust piles to overdrain any surface water that come down from above.

Q. After this fire do you know whether or not that culvert remained there open?

A. I don't think it did.

Mr. PLUMMER.—We object to that, and move to strike it out, what he thinks.

The COURT.—Yes, unless you know about it, witness, the answer will be stricken out.

Q. Do you know about it?

A. Well, the water stopped going through. [196]

Q. When it stopped going through what became of the water?

A. It just seeped through the sawdust.

Mr. HEITMAN.—I believe you may inquire.

Cross-examination.

(By Mr. PLUMMER.)

Q. How long was it before you left there in May, 1911, that you saw the Thompson boy there?

A. Well, I don't know exactly how long it was.

Q. Well, you say it was some time in the spring before you left there. What do you mean by the spring,—March, April, or May, or all three of them?

A. Well, it was some time after the weather had warmed up, so that the children would get out.

Q. Some time in May then?

A. I wouldn't say that.

Q. Well, according to your best recollection, when the weather warmed up. That is about when it warms up, up there, isn't it?

(Testimony of Charles Schmidt.)

A. It warms up there almost any time.

Q. Do you think it was about the month of May?

A. I think it was earlier than that.

Q. The latter part of April?

A. I couldn't say right when it was.

Q. Was it in April?      A. I wouldn't say.

Q. What time of day was it?

A. I couldn't say as to that either, because I didn't pay no attention to it, because I never thought nothing of it.

Q. Don't you know whether it was in the morning or afternoon, or whether it was noon, or when it was?  
[197]

A. I think it was in the evening, because I worked all day.

Q. In the evening?      A. Yes, sir.

Q. After dark?      A. No, not after dark.

Q. What do you mean? After five or six o'clock?

A. Along about five or six o'clock.

Q. Was he there alone?

A. No, sir; there was two other little children with him.

Q. Who were they?

A. Mrs. McCallister's little boy and a little girl.

Q. And you drove them away?      A. Yes, sir.

Q. When did you see them there after that?

A. I saw him there twice,—the same three children.

Q. What were they doing there?

A. Running around the sawdust pile, and one of them was stepping out and pushing the sawdust

(Testimony of Charles Schmidt.)

down over the edge.

Q. You had known the Thompson boy before that?

A. Yes, sir.

Q. Where did you see him?      A. Around town.

Q. Did you know his father at that time?

A. I did.

Q. Did you know his sister?      A. I did not.

Q. Did you know the McCallister boy?

A. Yes, sir.

Q. At that time?      A. Yes, sir.

Q. As a matter of fact, the McCallister boy was in Kansas City [198] and didn't come there until after the Thompson boy was drowned, isn't that true?

A. He wasn't in Kansas City all the time.

Q. You swear positively that the McCallister boy was with the Thompson boy in the spring of 1911?

A. I wouldn't swear when it was, but I will swear I ordered the three of them off of there.

Q. And one of them was the McCallister boy?

A. Yes, sir.

Q. You are sure of that?      A. Yes, sir.

Q. Are you sure it was 1911 at all?

A. Well, as I said before, I wasn't positive just when it was, but I know it was after the fire.

Q. After the fire?      A. Yes, sir.

Q. The fire didn't end until 1911, did it?

A. Well, the forest fire did.

Q. You left there a few days after the fire, didn't you?

A. No, sir. The forest fire, if I remember right, was on August 22d or 23d, when it struck right there.



(Testimony of Charles Schmidt.)

The COURT.—What year?

A. 1910. I left there in May, 1911.

Q. Was it in that fall then that you saw the Mc-Callister boy there?

A. As I said, I didn't know exactly when it was, but it was some time when the weather was warm and they were out playing.

Mr. PLUMMER.—That is all. [199]

Mr. HEITMAN.—There is one question I forgot to ask him, and with the permission of the Court—

The COURT.—Very well.

Redirect Examination.

(By Mr. HEITMAN.)

Q. What was the extent of the fire in the sawdust pile, that is, state whether or not it assumed such magnitude that the people in St. Maries could see it and know that it was on fire.

Mr. PLUMMER.—We object to it as leading and suggestive, and calling for a conclusion of the witness.

The COURT.—Overruled.

A. Well, it was, because they made such a kick about it; they was afraid it would set the town afire.

Mr. PLUMMER.—We object to that, and move to strike out the answer as irrelevant and immaterial, and calling for hearsay.

Mr. HEITMAN.—Showing knowledge on the part of the community.

Mr. PLUMMER.—It don't mean anything if they did know it,—wholly irrelevant.

The COURT.—I think the latter part may be stricken out, about the kicking.

(Testimony of Charles Schmidt.)

Q. State whether or not the fire department of the city made an effort to extinguish the fire.

A. I don't know whether it was the fire department, but the policemen helped, and part of the Coeur d'Alene Lumber Company's men helped; they used the city's hose and city water.

Q. About when was that?

A. Well, I couldn't recall the time.

Mr. HEITMAN.—That is all. [200]

**[Testimony of J. T. Carroll, for Defendant.]**

J. T. CARROLL, duly called and sworn as a witness on behalf of defendant, testified as follows, on

Direct Examination.

(By Mr. HEITMAN.)

Q. State your name and residence and business.

A. J. T. Carroll. I live in Coeur d'Alene most of the time, and part of the time in Montana. My occupation is manager of the Coeur d'Alene Lumber Company here, and some lumber concerns in Montana.

Q. You are acquainted with Schmidt Brothers?

A. I am, yes, sir.

Q. And you, on behalf of your company, had a contract with them whereby they used their mill for sawing some of your lumber? A. I did.

Q. Some years ago? A. Yes, sir.

Q. State whether or not you knew of any wells or cisterns which were dug at or near their mill when they were operating it.

Mr. PLUMMER.—Objected to as irrelevant and

(Testimony of J. T. Carroll.)

immaterial, and on the further ground that the superintendent of that company testified, at that time, Mr. Hunt, that he saw them dig the well. It is immaterial whether this particular officer knew of it or not.

The COURT.—Objection overruled.

Q. Answer the question.

A. Answer the question?

Q. Yes.

A. Well, we had a small well; it is hard to call it a well, about the depth of a barrel, that set some 75 feet, I should think, from where this pile of sawdust was that I understand that the boys [201] dug—

Q. Never mind what you understand. Just state what you know about it.

A. Well, we had two small wells about the size of a barrel dug to get water for our horses in. The place where the boys were drowned I knew nothing of, didn't know it was there; never knew it was there.

Q. About how deep was the water in this well that you used, this well or hole that you used for watering your horses?

A. It wasn't over three feet deep, I don't think. It might have been sometimes three and a half, and sometimes not so deep, and maybe sometimes a little deeper. It would be owing to how the water run at that time. Sometimes there was very little water in that creek, and sometimes there was more.

Q. Do you know which one of your employees had the well dug, that is, for your horses?

Mr. PLUMMER.—That is wholly immaterial, if

(Testimony of J. T. Carroll.)

the Court please. I understand that well isn't in this case.

Mr. HEITMAN.—You brought it out and wanted to know why it wasn't covered up.

Mr. PLUMMER.—The Court held it immaterial.

The COURT.—Sustained.

Q. You say you didn't know about these other wells that the Schmidt Brothers used?

A. I did not. In fact, I don't know whether you would call it a well or not. It is for getting water for their engines, I think.

Mr. PLUMMER.—We object to that, if he don't know what it was. I move to strike it out.

The COURT.—Yes, it may be stricken out.

Q. State whether or not you ever knew that the covering on these wells that the Schmidt Brothers dug had ever been removed. [202]

Mr. PLUMMER.—We object to that because he has testified that he didn't know there was any well there.

The COURT.—Objection sustained.

Mr. HEITMAN.—That is all.

Cross-examination.

(By Mr. PLUMMER.)

Q. Where do you reside, Mr. Carroll?

A. Most of the time in Coeur d'Alene.

Q. You are located up at St. Maries too, are you?

A. No, sir.

Q. Have you ever been up there?

A. A few times.

(Testimony of J. T. Carroll.)

Q. Have you ever lived up there or stayed up there?     A. No, sir.

Q. Ever examine the company's properties up there?     A. Yes, sir.

Q. You have charge of the properties, haven't you?

A. Well, in a certain way I did. We have a retail lumber yard up there, and we had this contract with Schmidt Brothers to saw out a lot of pieces of timber through there for railroad ties and timbers mostly.

Q. You had general charge of all that class of work, did you?

A. Well, I didn't in particular have general charge of it; Mr. Hunt looked after it for us.

Q. He was under you, wasn't he?     A. Yes, sir.

Q. He was the superintendent, and what was your official position?     A. How is that?

Q. What was your official position? [203]

A. My business was to go over occasionally and look after the—

Q. What office did you hold?

A. The same as I explained awhile ago, general manager of the Coeur d'Alene Lumber Company.

Q. You didn't explain it to me. You might have told him, but I didn't hear you.

Mr. PLUMMER.—That is all.

Mr. HEITMAN.—That is all. If the Court please, we desire to make a motion, and think the jury might be excused.

Mr. PLUMMER.—You haven't rested yet, have you?

Mr. HEITMAN.—Yes; we rest.



(Testimony of O. J. Thompson.)

Mr. PLUMMER.—I would like to have some rebuttal first.

Mr. HEITMAN.—Oh, I beg your pardon. [204]

**[Testimony of O. J. Thompson, for Plaintiff  
(Recalled in Rebuttal).]**

O. J. THOMPSON, heretofore duly sworn, upon being recalled in rebuttal, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. Mr. Thompson, was you ever upon these grounds in question? A. No, sir.

Q. Did you ever talk with either of the Schmidt Brothers that testified on the stand?

A. Not until after—well, I have talked with them since they got done sawing there; I didn't know them before.

Q. Since the accident, have you?

A. Some time I expect before the accident, but since they quit running the mill there.

Q. You never was up on the ground at all?

A. No, sir.

Q. You heard the testimony of the first Schmidt Brother there that testified that he talked with you there in the fall of 1907? A. Yes, sir.

Q. When did you move to St. Maries?

A. I moved to St. Maries the 24th day of April, 1908.

Q. Where from?

A. From Kansas City, Missouri.

Q. Had you ever been near St. Maries or in Kootenai County or in the State of Idaho before that

(Testimony of O. J. Thompson.)

time?     A. No, sir.

Q. Do you know when the McCallister boy came there?     A. Just about.

Q. When was that?

A. The first time he came before I did; he came in November or December, 1907. [205]

Q. Did you ever know of your boy being up there on the ground at all at any time?     A. No, sir.

Q. Was the McCallister boy there at all in 1911?

A. He came back there about July, 1911.

Q. July?     A. Yes, sir.

Q. But he wasn't there until after your boy was drowned?

A. No, sir; he left there I should say about September, 1910, just after the forest fire, he left there for Kansas City, and was back about July, 1911.

Q. Were you ever informed, either directly or indirectly, of the condition of these premises in reference to this well being there, or any other dangerous condition?

Mr. McFARLAND.—We object to that as not proper rebuttal; that is part of their main case.

The COURT.—I don't quite understand you, Mr. McFarland. How would it be part of their main case? The only relevancy of this would be to the defense of contributory negligence; unless you abandon that defense it would be relevant.

Mr. McFARLAND.—No, we don't abandon any of our defenses.

Mr. PLUMMER.—Answer the question.

WITNESS.—What was the question?

(Testimony of O. J. Thompson.)

Q. (Last question read.) A. No, sir.

Mr. PLUMMER.—You may take the witness.  
[206]

Cross-examination.

(By Mr. McFARLAND.)

Q. How far did you live from the McCallister's in St. Maries? A. About four and a half blocks.

Q. How did you happen to know when the boy left to go to Kansas City and when he returned, the McCallister boy?

A. The boy is my sister's boy; I am pretty well posted.

Q. Where were you when he left Kansas City for St. Maries? A. Where was I?

Q. Yes. A. I was in St. Maries.

Q. And you say that he came out before you did in 1907, from Kansas City?

A. The first time he came I was in Kansas City.

Q. Do you know just exactly what time he left there for St. Maries? A. No, sir.

Q. You do not know how long before you left for Kansas City he left?

A. He left there in I should judge November or December, in 1907, and I left there the 20th day of April, 1908.

Q. The last time he went back to Kansas City do you know what month he went?

A. He went in September.

Q. How do you know that?

A. Because it was just a few days after the forest fire in August.

(Testimony of O. J. Thompson.)

Q. How many days afterwards?

A. I don't know just exactly, but then some few days.

Q. Do you know what day they had the forest fire there at [207] St. Maries?

A. There was two or three days we was pretty well worked up.

Q. What days was that?

A. Between the 20th and the 24th of August.

Q. What day in September did he leave for Kansas City?     A. I don't know exactly.

Q. How long did you say he was gone?

A. He came back the following year to St. Maries, I think in July.

Q. Do you know exactly the month he returned?

A. No, sir, I couldn't swear to it.

Q. I hand you what purports to be the original complaint in your action against the Coeur d'Alene Lumber Company in this case, and ask you if that is your signature there, Oliver J. Thompson.

A. It is.

Q. You swore to that?     A. Yes, sir.

Q. Now you say you don't know that your son was ever on this sawdust pile, at the sawdust pile, before the time he was drowned?     A. Yes, sir.

Q. When you signed and swore to this complaint what did you mean by this statement: "That the dangerous condition of said premises and the danger of small children falling in the said well or cistern and becoming drowned, and the habitual use of said premises by said Bernarr Thompson and other compan-

(Testimony of O. J. Thompson.)

ions and children of tender years was open and notorious up to the time of the death of said Bernarr Thompson." What did you mean by saying that he habitually used these premises up to the time of his death, if he had never been there before that day? [208]

A. He may have been there, but I didn't know it.

Q. Then why did you swear in this complaint that he had habitually been there and used the premises?

A. Well, I didn't think I did.

Mr. McFARLAND.—We offer this part in evidence.

Mr. PLUMMER.—It is already in the case, but I have no objection to it.

The COURT.—Yes.

Mr. McFARLAND.—That is all.

Mr. PLUMMER.—That is all.

**[Testimony of Mrs. Clara Thompson, for Plaintiff  
(Recalled in Rebuttal).]**

MRS. CLARA THOMPSON, heretofore duly sworn, upon being recalled on behalf of plaintiff in rebuttal, testified as follows, on

**Direct Examination.**

(By Mr. PLUMMER.)

Q. Mrs. Thompson, when did you and Mr. Thompson move to St. Maries? A. In 1908.

Q. What month? A. April.

Q. Did you bring your daughter here with you that is in the courtroom? A. Yes, sir.

Mr. PLUMMER.—That is all.

Mr. McFARLAND.—That is all. [209]



**[Testimony of Frank B. Jones, for Plaintiff  
(Recalled in Rebuttal).]**

FRANK B. JONES, heretofore duly sworn, upon being recalled in rebuttal, testified as follows, on

Direct Examination.

(By Mr. PLUMMER.)

Q. I believe you testified on your previous examination, did you not, that you were working there for the Coeur d'Alene Lumber Company, looking after the fire in the sawdust? A. Yes, sir.

Q. In the summer of 1910? A. Yes, sir.

Q. Did you at that time, or at any time that you worked around there, see any planking or covering for these wells? A. No, sir.

Q. Was there anything of that kind there when you stuck the stick down to see how deep it was?

A. No, sir.

Q. Was there anything to indicate that any had been there? A. No, sir.

Q. And did you or did you not see this pool there before the fire in the sawdust? A. Yes, sir.

Q. For how long?

A. Well, I have known it to be there; I have hauled sawdust away from there every spring for three or four springs.

Q. Was there anything there to indicate any covering or anything to indicate a covering?

A. No, sir.

Mr. WHITLA.—Q. There was a pool there all the time?

(Testimony of Frank B. Jones.)

A. Yes, sir, there was water, but I never saw any covering. [210]

Cross-examination.

(By Mr. McFARLAND.)

Q. Did you ever examine these holes to see whether there was any curbing there?

A. No, sir.

Q. Did you ever examine the holes to see if there was any covering on them?

A. No, sir, only the one time when I run that edging down in there.

Q. When was that—after the fire?

A. That was when I was watching this fire, when I come pretty near getting in there myself.

Q. That was after this forest fire?

A. Yes, sir.

Q. And you never made any examination of the premises to ascertain whether there was any culvert or box-drain from there? A. No, sir.

Q. You don't mean to tell this jury that there never was any, do you?

A. No, sir; if there was it was always covered over, because there was always water and no cover in sight, is what I mean.

Mr. McFARLAND.—That is all.

Mr. PLUMMER.—I will offer in evidence this part of paragraph two of the amended answer, as follows: "That back of said sawmill there was and is a small ravine, through which water flowed, and which sloped from the hillside toward the mill site of said Schmidt Brothers and terminated at the said

piles of sawdust into a small pond or sink; that said pond so formed as aforesaid was about twenty-five or thirty feet long, by about twelve or fifteen feet wide; and at all [211] of the times herein mentioned remained open, unenclosed and uncovered, and was and is off and out of the way of any public highway, road, street or alley; that said pond was formed and caused by said Schmidt Brothers in leaving upon said mill site, viz., said northeast quarter of the northeast quarter, as aforesaid, piles of sawdust against which the waters in said ravine, flowed, stood and remained.”

Mr. McFARLAND.—We object to that as incompetent, irrelevant and immaterial, and not proper rebuttal.

The COURT.—Overruled.

Mr. McFARLAND.—An exception.

Mr. PLUMMER.—And also this part of the amended answer we offer which says that: “There-upon the said Schmidt Brothers located their saw-mill on said northeast quarter of the northeast quarter and immediately commenced operating said saw-mill and manufacturing said logs into timber and lumber, and continued so to do up to and including some time in the month of October, 1908.”

Mr. McFARLAND.—The same objection, if the Court please.

The COURT.—Overruled.

Mr. McFARLAND.—An exception.

Mr. PLUMMER.—We rest.

Mr. McFARLAND.—We now desire to make our motion, if the Court please.

The COURT.—Yes. The jury may be at ease for ten minutes.

(The jury retired from the courtroom.)

Mr. McFARLAND.—If the Court please, at this time the defendant renews its motion for a nonsuit, upon the grounds and for the reasons stated in its motion for a nonsuit made at the close of the testimony for the plaintiff, and moves for an instructed verdict, or [212] that the Court instruct the jury to find for the defendant, upon the grounds and for the reasons stated in defendant's motion for a nonsuit, and for the following other reasons:

That the testimony in this case shows that these holes or wells or cisterns, whatever they may be or are called, were not dug or made by the defendant, but were made by Schmidt Brothers, independent contractors, and that at the time that the holes, cisterns, or wells were dug, Schmidt Brothers, as independent contractors, had the contract introduced in evidence with the defendant and were operating upon the premises described in the complaint a saw-mill plant of their own, and that the defendant had no interest in the ownership of the plant, and did not participate in the operation thereof, and that the defendant took no part in digging, making or maintaining these holes, cisterns, or wells, and had no knowledge of their existence; that the evidence shows that the wells, holes, or cisterns were properly covered, and were afterwards uncovered without the knowledge or the consent of the defendant.

The COURT.—The motion is denied.

Mr. McFARLAND.—We except.

The COURT.—Very well. Have you your requests for instructions ready, gentlemen?

Mr. PLUMMER.—We have some. Mr. Whitla isn't here. He will be back in just a second, your Honor. We prepared them this noon, however. I have two forms of verdict here prepared on the part of the plaintiff. Have you any prepared for the defendant?

The COURT.—There should be two verdicts. I think I have them here.

Mr. PLUMMER.—I have two forms for the plaintiff; I didn't prepare any for the defendant; at least I don't see any here. [213]

The COURT.—The clerk has already prepared forms, so you may take these.

Mr. PLUMMER.—All right.

The COURT.—Have you any instructions, Mr. McFarland?

Mr. McFARLAND.—No, your Honor.

Mr. PLUMMER.—Does your Honor fix the time of the argument? I think we ought to limit it in some way so as to get through by five o'clock if we can. I am willing to do it.

The COURT.—I would like to fix a time that would be agreeable to both sides. How long a time do you want, gentlemen?

Mr. McFARLAND.—We won't want over an hour a side.

Mr. PLUMMER.—We can't get through by five o'clock by taking an hour a side.

The COURT.—If you get through to-day it will be necessary not to take too much time for the argu-



ment. I want to give you all the time you think is reasonably necessary. I have an equity case set for this evening. If you think an hour a side is reasonably necessary I will give it to you.

Mr. McFARLAND.—I meant a half hour apiece between us.

The COURT.—Well, that will take two hours altogether.

Mr. McFARLAND.—If the plaintiff consumes that much time it will, yes. I will say this, if the Court please, that usually I am very short in my argument, and I guess about twenty minutes apiece will be enough.

The COURT.—I will give you as much time as you think is reasonably necessary. If you think that twenty or twenty-five minutes each side will be sufficient.

Mr. PLUMMER.—Make it forty minutes on a side.

Mr. McFARLAND.—We will take twenty minutes apiece, if the Court please.

The COURT.—Well, that will be forty minutes a side then. [214] You may call in the jury.

(The jury returned into court, and counsel proceeded to argue the case to the jury, after which the Court instructed the jury as follows, and the following proceedings were had, to wit:) [215]

### **Instructions of the Court.**

Gentlemen of the jury, as you possibly already understand, there were two separate actions commenced in this court, one by Mr. Thompson and one by Mr. Moore. The two suits are entirely distinct,

but because of the fact that they both involve the same accident, counsel have agreed that they should be tried together, that is, substantially the same evidence is applicable to both cases, and therefore, to save time, and for convenience, that arrangement was made. When it comes to a consideration, however, of your verdict, you are to treat each case as absolutely independent of the other, so far as the verdict is concerned. Of course, you will consider the evidence, but it is necessary for you to find two verdicts, one verdict in the Moore case, and the other in the Thompson case. You may not find any substantial difference between the two cases, and you may find some difference; that is for you to say. In my instructions I shall refer to but one case, but you will understand that the instructions applicable to one are applicable also to the other.

The theory of the case, gentlemen, is that a child's life is of some value to its parents,—its father in this case,—and under the law if the child is killed through the negligence of some other person such person is liable to the injured parent. Briefly stated, that is the theory of the law. If I am negligent, and my negligence results in your child's death, you are entitled to recover from me money compensation for the injury which you have sustained through my negligence. Hence, as has been stated by counsel, the primary, if not the controlling, inquiry upon your part in the case, is whether or not the defendant was negligent. Then the next necessary step or inquiry is, did that negligence contribute to the death of the child? Then, did the [216] plaintiff here, the

father of the child, through his carelessness, contribute to the injury, or accident; the general rule of law being that if the defendant is negligent and the plaintiff also is negligent, and the negligence of each contributed to the accident or injury, the plaintiff cannot recover. So that if you find that the defendant was negligent, and that negligence was the proximate cause of the death of the child, and that the plaintiff did not, by his carelessness or negligence, contribute to the death, then there is the fourth inquiry, namely, what amount of damages or compensation should be awarded to the plaintiff: You will see that that comes in as a secondary inquiry. The theory of the plaintiff is, (and I speak of its theory as set forth in its pleadings, by which we are governed), that the defendant was the owner of certain premises near the town of St. Maries,—I think the fact of the ownership of the land is not denied, and hence is not in issue,—that it, the defendant, caused or permitted a well or hole to be sunk on these premises near the town, and also permitted to be placed near this well, and to remain, large piles, or a large pile, of sawdust, and that this sawdust is naturally attractive to children and that by reason of the close proximity of the premises to the thickly populated community, that is, a village community like St. Maries, where there is a large number of children, the children finding this sawdust to be attractive, were lured there or attracted, as children will be, to play, and (reading from the complaint), that on June 1, 1911, when the plaintiff's son, (this in the Moore case), Russell G. Moore, had been

thus attracted, together with other children, and was playing in and about these premises, close to and in the immediate vicinity of the well or cistern which at the time was filled on a level with the ground with water, said Russell G. Moore, that is, the boy, while so playing [217] therein and thereabout, accidentally and inadvertently fell into said well or cistern and was drowned. Now, that is the case which the plaintiff presents, and it is for you to find upon the several issues as I have suggested them to you. As I have already said, the primary question is, whether or not the defendant was negligent. It involves several different considerations. It is a case where, in a number of its phases, it is necessary for the jury to bring to bear their common sense and experience in determining whether or not the defendant is liable. Upon reflection you will see that it is not in every case where a child is injured that the owner of the premises is responsible. We know that children play here and there, and very often in a village or urban community they go from yard to yard, either with or without the permission of their parents, when no one particularly is to blame, and the children are sometimes hurt, and are even sometimes killed, without the negligence or fault of anyone. In a case like this, as in any other case, negligence is defined as the doing of something which an ordinarily prudent person would not, under the circumstances, have done, or leaving undone something which an ordinarily prudent person would, under such circumstances, have done. Hence you should keep before you all the time the inquiry, what would



a reasonably prudent person have done under the circumstances, or what would he have left undone? Keep that inquiry before you all the time; What was reasonably prudent? What would reasonably prudent people generally have done under the circumstances? As I was about to say, a child may come upon another's premises in a town and be injured, for instance by a lawn mower that happens to be upon the premises, or an axe, or a hoe, or a rake, or may be injured by falling from a tree into which it has climbed in the pursuit of its innocent pleasures, [218] and, of course, ordinarily you do not think of such casualties as being the result of the fault or negligence of any person; they are taken as unavoidable accidents. Upon the other hand, if a man, knowing that a young child is playing in his yard, or is accustomed to play in his yard, should leave in the place where the child has been accustomed to play, as is known by the owner, a loaded gun, the mechanism of which is known to be more or less attractive to children, and the child, in playing with that gun, should discharge it and kill or injure himself, we would probably say that that was a careless thing to do; a prudent man wouldn't do a thing of that kind. Or if we should leave an attractive bottle of poison, or with an acid that would, if it came into contract with the flesh, burn it and mar or scar the child, we would probably say that was a negligent thing to do. I speak of these as extreme illustrations, in order to impress upon you the necessity of keeping before you all the time the relations of children to older people, and to direct your attention to



the question of what prudent or imprudent people might do under certain circumstances. The primary question therefore is, in the light of all the circumstances of the case, was the defendant negligent, and did such negligence contribute to the accident? What, under like circumstances would an ordinarily prudent person have done? Inquire first, were the conditions attractive to children as alleged in the complaint; second, were the conditions known, or should they have been known, to the defendant; third, should the defendant, in the exercise of reasonable care, have anticipated the danger of injury to the child in this case?

Some instructions which I have been asked to give I now give as my own (out of the narrative form), and you will consider [219] them in the light of all other instructions. I say to you, that if you find from the evidence that the premises in question were, in the manner alleged, maintained by the defendant in such condition as to be attractive and inviting to children of tender years, who, by reason of said inviting and attractive character of the premises did go upon and about the same, in the vicinity of where the well was situated, if you find there was a well maintained thereon, and defendant knew of the use made of said premises by said children of tender years a number of months prior to the accident, then I instruct you that that amounts to an implied invitation on the part of the defendant to the children to go thereupon and play upon the premises, that is, if that was done without objection on the part of the defendant.

If you find from the evidence in this case that children frequently and habitually played on the premises of the defendant, and particularly upon and around the sawdust pile and well alleged to have been on said premises, and that such use of the premises by the children continued for several months prior to the time of the accident, then and in such case, if you find from the evidence such to be the fact, the law imputes knowledge of the use of said premises for a playground by the children to the defendant, whether it had actual knowledge or not.

I advise you that under the contract in evidence the Schmidt Brothers were independent contractors, and in digging the well they were not the agents or employees of defendant, and the act of digging the well was not the act of defendant. In this connection however, I further instruct you that if the defendant knew of the existence of the well, and from time to time knew of its condition having such knowledge, that is, if it had such knowledge, its responsibility would be the same as if it had originally caused the well to be excavated. If, under the other instructions given, you find from the evidence that defendant maintained the premises [220] upon which the boy was drowned for a considerable length of time, that is for several months prior to the death of the boy, in such a condition as to be inviting and attractive to children of tender years, in the manner alleged, and that by reason of said attractive condition of said premises the boy went upon the premises for the purposes of amusement, and while there met his death by reason of the dangerous condition of

said premises, and in the manner alleged, if you find said premises to have been maintained in a dangerous condition by defendant under all the circumstances, and the plaintiff himself was not careless in permitting the boy to be upon the premises, and that the boy did not understand or appreciate the dangerous condition of the premises, if you find them to have been in a dangerous condition, then you will find for the plaintiff. I have already stated to you that even though the defendant may have been negligent, if the plaintiff himself was negligent, and his negligence contributed to the death of the child, then he can't recover. Hence we come to this inquiry: Was the plaintiff himself careless or negligent in permitting his child to go upon these premises, and, if so, did his carelessness or negligence contribute to the accident? If you find such to be the case, then you should find for the defendant.

I may say to you in this connection, gentlemen, that the burden of proof in a civil case is always upon the party asserting a fact to be true, so that here the burden of proof showing that the defendant was negligent, and that such negligence contributed to the death of the child is upon the plaintiff. It was his duty to show by a preponderance of the evidence these facts. Upon the other hand, contributory negligence of the plaintiff is what we call an affirmative defense, and it is necessary for the defendant to allege that and prove it by a preponderance of the evidence. [221] The burden of showing contributory negligence is upon the defendant, and as to the negligence of the defendant, the burden

is upon the plaintiff.

If you find for the plaintiff, you may give him as damages such sum or sums as under all the circumstances of the case you find from the evidence may be just, not exceeding the sum prayed for in the complaint. In determining the amount, you may take into consideration the age, health, and intelligence of the child, the degree of intimacy existing between it and the father—between the father and the child, and the father's loss of companionship. You may also take into consideration in this connection such assistance, financial and otherwise, as such son might reasonably be expected to give to his father both before and after he reached the age of majority, bearing in mind, upon the other hand, also the cost and expense to the father of maintaining and educating the child. You will see that that measure of damages is in accord with reason. Upon the one hand the father profits and receives a benefit from having a child; upon the other hand, the obligation of the father to the child is a burden, and in considering the benefit you must also consider the burden. And I have to say here that the law has not, and could not very well furnish to you a precise or accurate standard or measure of the damages to be allowed. The matter is committed very largely, under the instructions which I have given, to your own good sense and good judgment.

You are the sole judges of the evidence, the issues of fact, the weight to be given to the testimony of the witnesses, and the credibility of the witnesses. In judging of these matters, bring to bear your ex-



perience and such considerations as you have learned are applicable to human testimony in the practical affairs of life. Consider the interest of the witnesses in the result of the litigation; their relationship to the parties; their candor or lack of candor in testifying; their means or lack of means of knowing well the facts to which they testify; and all other circumstances [222] in evidence tending to give or to take away from their credence. If you find that any witness has wilfully testified falsely to any material fact, that is, that any witness has perjured himself on any point, you may reject his entire testimony, unless his other testimony is corroborated by other credible witnesses, or by other facts and circumstances which you believe to be true.

It is necessary that you all concur in finding a verdict. Two forms of verdict have been prepared in each case, one for the plaintiff and the other for the defendant. If you find for the defendant all that is necessary for you to do is for your foreman to sign the verdict, which finds that: "We the jury in the above-entitled cause find for the defendant." If you find for the plaintiff it will be necessary to enter in the blank left for that purpose the amount of damages which you award to the plaintiff.

The bailiff may come forward and be sworn.

(Bailiff sworn.)

You may retire and remain in the hallway for a few moments, gentlemen, until I send you word.

(Jury retired.)

Gentlemen, you may take your exceptions.



**[Plaintiff's Exceptions to Instructions Given and Refused.]**

Mr. WHITLA.—The plaintiff excepts to the instructions given by the Court as follows: “I advise you that under the contract in evidence the Schmidt Brothers were independent contractors, and in digging the well they were not the agents or employees of the defendant, and the act of digging the well is not the act of defendant”; for the reason that the contract introduced in evidence shows that Schmidt Brothers were not independent contractors, but that they had contracted to perform labor for the defendant in cutting all of the timber upon section 27, 46 north of range 2 West of Boise Meridian, and that the cut under said contract was to be made, according to the evidence introduced, under the directions and instructions of the defendant, and that there is not any proper issue [223] in this case warranting the giving of such instruction, and said instruction does not correctly state the law, but is erroneous and misleading.

The Court further erred in refusing to give the instruction requested by the plaintiff, as follows: “The Court instructs the jury that the fact that the defendant had the contract with Schmidt Brothers which has been introduced in evidence in this action is no defense to the plaintiff’s action,” the refusal of the Court being erroneous for the reason that said contract is no defense, and the Court erred in not so instructing the jury.

Mr. HEITMAN.—Defendant excepts to Instruc-

tion No. 1, given by the Court, as follows: "If, under the other instructions given, you find from the evidence that defendant maintained the premises upon which the boy was drowned for a considerable length of time, that is, for several months prior to the death of the boy, in such condition as to be inviting and attractive to children of tender years, in the manner alleged, and that by reason of said attractive condition of said premises the boy went upon the premises for purposes of amusement, and while there met his death by reason of the dangerous condition of said premises, and in the manner alleged, if you find said premises to have been maintained in a dangerous condition by the defendant under all the circumstances, and the plaintiff himself was not careless in permitting the boy to be upon the premises, and that the boy did not understand or appreciate the dangerous condition of the premises, if you find them to have been in a dangerous condition, then you will find for the plaintiff," for the reason that it directs the jury to render a verdict for the plaintiff regardless of their contributory negligence; that is, it is not limited by the question of contributory negligence.

Defendant excepts to the giving of Instruction No. 4, by the Court, as follows: "If you find from the evidence that the premises in question were, in the manner alleged, maintained by the [224] defendant in such condition as to be attractive and inviting to children of tender years, who, by reason of said inviting and attractive character of the premises, did go upon and about the same, in the vicinity of where the well was situated, if you find there was a well

maintained thereon, and defendant knew of the use made of said premises by said children of tender years a number of months prior to the accident, then I instruct you that that amounts to an implied invitation on the part of the defendant to the children to go upon and play upon the premises, that is, if that was done without objection on the part of the defendant," for the reason that it is not qualified by a reference to the fact that there is evidence in the case showing that the children not only had not been invited upon said premises, but had been forbidden from coming upon said premises by the defendant.

The COURT.—Each party may have sixty days in which to prepare and serve bill of exceptions.

At 8:20 P. M. the jury returned into court, and the following proceedings were had, to wit:

The COURT.—Have you agreed upon a verdict, gentlemen?

FOREMAN.—We have. (Handing verdict to the Court.)

*"United States District Court, Northern Division,  
District of Idaho.*

O. J. THOMPSON,

Plaintiff,

vs.

THE COEUR d'ALENE LUMBER COMPANY,

Defendant.

### VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff and assess the damages at the sum of (\$2500.00) Twenty-five Hundred Dollars.

W. A. ALEXANDER,

Foreman." [225]

*“United States District Court, Northern Division,  
District of Idaho.*

ELIJA O. MOORE,

Plaintiff,

vs.

THE COEUR d’ALENE LUMBER COMPANY,  
Defendant.

**VERDICT.**

We, the jury in the above-entitled cause, find for the plaintiff and assess the damages at the sum of (\$2500.00) Twenty-five Hundred Dollars.

W. A. ALEXANDER,

Foreman.”

Mr. McFARLAND.—We desire to have the jury separately polled, if your Honor please.

The Clerk thereupon polled the jury, each juror answering “Yes, sir,” upon being asked if the above were their verdicts.

Mr. McFARLAND.—We except to the verdict in each case, if the Court please. And to save our rights we give notice at this time of intention to move for a new trial in each case.

The COURT.—Very well.

**Order Settling Bill of Exceptions.**

I, Frank S. Dietrich, United States District Judge, for the District of Idaho, being the Judge who presided in said court at the trial of the case of O. J. Thompson, Plaintiff, vs. Coeur d’Alene Lumber Company, a Corporation, Defendant, tried in said first-named court, beginning on the 6th day of June, A. D.



1913, do hereby certify that the foregoing Bill of Exceptions was presented to me by counsel for said defendant on the 26th day of August, A. D. 1913, for settlement, and it appearing to me that the same had been, within the time allowed by law and within the time allowed by orders of Court extending said time, duly and regularly [226] served upon the attorneys for plaintiff, together with notice that the same would be presented for settlement, and the attorneys for the plaintiff having made no objection to the settlement thereof, and having offered no amendments thereto, and it appearing to me that said bill of exceptions is correct and contains all the evidence adduced upon the trial of said cause, and all of the exceptions taken by the defendant to the admission of evidence and to the giving and refusal to give instructions to the jury, and including all of the evidence had and taken upon said trial, as well as all of the proceedings therein, the said bill of exceptions is hereby settled, allowed and certified as a true bill of exceptions in this case, and I hereby certify that the same contains all of the evidence adduced, all of the exceptions taken, and all of the proceedings had upon the trial of said case, and said bill of exceptions is hereby settled, and certified accordingly.

Dated this 17th day of September, A. D. 1913.

FRANK S. DIETRICH,

Judge.

**Admission of Service of Bill of Exceptions.**

Service of the foregoing Bill of Exceptions at Coeur d'Alene, Kootenai County, State of Idaho, by



receipt of a true and correct copy thereof on this 13th day of August, A. D. 1913, is hereby admitted.

W. H. PLUMMER,  
WHITLA & NELSON,  
Attorneys for Plaintiff.

By MURIEL TAYLOR,  
Stenographer. [227]

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**Stipulation for the Settlement of Bill of Exceptions.**

It is hereby agreed and stipulated by and between the plaintiff and the defendant in the above-entitled action, that the above and foregoing bill of exceptions is true and correct, and that the same may be signed, settled and certified by the Judge of the above-entitled court at such time and place as he may see fit, without further notice to either party of the time or place of such settlement.

Dated this 23d day of August, A. D. 1913.

W. H. PLUMMER,  
WHITLA & NELSON,  
Attorneys for Plaintiff.

McFARLAND & McFARLAND,  
C. H. HEITMAN,  
Attorneys for Defendant.

[Endorsed]: Filed Aug. 26, 1913. A. L. Richardson, Clerk. Refiled Sept. 17, 1913. A. L. Richardson, Clerk. [228]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR d'ALENE LUMBER COMPANY, a Cor-  
poration,

Defendant.

**Petition for Writ of Error.**

To the Honorable Judges of the United States Cir-  
cuit Court, for the Ninth Circuit, District of  
Idaho.

The above-named defendant, Coeur d'Alene Lum-  
ber Company, a corporation, conceiving itself to be  
aggrieved by the verdict, decision and judgment of  
this Honorable Court, made and entered on the 7th  
day of June, A. D. 1913, at Coeur d'Alene, State of  
Idaho, in the above-entitled action, and by errors of  
the Court in the progress of the trial of said cause,  
does hereby pray for a Writ of Error from the United  
States Circuit Court of Appeals in and for the Ninth  
Circuit to the United States Circuit Court, District  
of Idaho, to review said verdict, decision and judg-  
ment, and herewith files its assignment of errors,  
and prays that a Judge of said court may allow said  
writ and direct that a transcript of the record of the  
proceedings upon which said judgment was entered,

duly authenticated, be sent to said Circuit Court of Appeals.

McFARLAND & McFARLAND,  
P. O. Address, Coeur d'Alene, Idaho.  
C. L. HEITMAN,  
P. O. Address, Spirit Lake, Idaho,  
Attorneys for Defendant.

[Endorsed]: Filed Sept. 2, 1913. A. L. Richardson, Clerk. [229]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR d'ALENE LUMBER COMPANY, a Corporation,

Defendant.

**Assignment of Errors.**

The above-named defendant, in support of its petition for a writ of error in the above-entitled cause, hereby assigns the following errors:

I.

The trial Court erred in overruling the defendant's demurrer to the complaint herein because said complaint does not state facts sufficient to constitute a cause of action against this defendant, in that it shows upon the face thereof that plaintiff knew of the dangerous condition of said well, hole, sink or cistern long prior to the drowning of his minor son

therein, as the complaint alleges that the dangerous and unsafe condition of said premises was open and notorious prior to the death of said Bernarr Thompson, and plaintiff was guilty of such gross contributory negligence in not restraining and preventing his said son from going in, about or upon said premises as would preclude him from recovering for his death. And the trial Court erred in overruling defendant's demurrer to the complaint herein on the ground, and for the further reason that said complaint is uncertain, unintelligible and ambiguous in this; that it is not alleged therein and does not appear thereby how long prior to the first day of June, 1911, defendant [230] owned, operated or maintained the saw-milling and woodworking plant mentioned in paragraph 4 of said complaint, and further in this: that it does not appear from said complaint how long prior to the first day of June, 1911, the date of the drowning of said minor child of plaintiff, defendant caused all of said buildings, machinery, and appliances mentioned in paragraph 5 of said complaint, to be removed off of the lands and premises mentioned in the complaint, and further in this, that it does not appear therefrom or thereby in what manner or how or by what means defendant recklessly, negligently or carelessly maintained said well and cistern as alleged in paragraph 6 of said complaint, or in what said alleged carelessness, recklessness or negligence consists.

## II.

The trial Court erred in overruling defendant's objection to the admission of any testimony in said

cause on the ground and for the reason that the complaint does not state facts sufficient to constitute a cause of action.

### III.

The trial Court erred in entering judgment for plaintiff and against said defendant herein for the sum of Twenty-five Hundred Dollars (\$2,500) upon the verdict of the jury, and in entering the judgment on the amount of said verdict.

### IV.

The trial Court erred in overruling the defendant's objection to permitting plaintiff, during the trial of the case, to amend his complaint, and in permitting plaintiff to amend his complaint by adding to paragraph 7 by interlineation the following: "That in addition to said well so located on said land of the defendant a large amount of sawdust had been accumulated from the lumber mill theretofore located on said land, and said sawdust [231] was strewn and scattered around and upon said land and surrounding said well as aforesaid in large piles, and constituted and was an attractive and inviting place for children of tender years to congregate and play, and children of tender years did habitually play upon the lands of said defendant, and the well or cistern herein complained of was located adjoining said sawdust pile so that said sawdust pile partially surrounded the same, and by reason of the location of said sawdust pile the lands of defendant attracted children thereto to play thereon and upon said sawdust pile surrounding said well or cistern," for the reason and because said amendment took defendant



by surprise, and changed plaintiff's cause of action, and contradicted the complaint as it originally stood without such amendment.

#### V.

The trial Court erred in permitting plaintiff, over the objection of the defendant, during the trial, to amend his complaint by striking out of paragraph 8 of said complaint the following words: "Was open and notorious up to the time of the death of said Bernarr Thompson," for the reason that such amendment took defendant by surprise and eliminated from the complaint admissions of plaintiff of contributory negligence.

#### VI.

The trial Court erred in overruling and denying defendant's motion for a nonsuit, made herein at the close of the testimony, because the plaintiff failed to prove a sufficient case for the jury, said motion having been made under the provisions of Section 4354 of the Revised Codes of the State of Idaho, which is as follows: [232]

Section 4354. "An action may be dismissed or a judgment of nonsuit entered in the following cases:

1. By the plaintiff himself at any time before the trial upon the payment of costs; provided, a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon;

2. By either party upon the written consent of either;

3. By the Court when the plaintiff fails to appear on the trial, and the defendant appears and asks for a dismissal;

4. By the Court when, upon the trial and before the final submission of the case, the plaintiff abandons it;

5. By the Court upon motion of the defendant when, upon the trial, the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register. Judgment may thereupon be entered accordingly."

The plaintiff having failed to prove a sufficient case for the jury in the following particulars;

A. The evidence failed to prove that for some or any time prior to June 1st, 1911, defendant owned, operated or maintained a sawmilling or woodworking plant consisting of buildings, machinery, appurtenances or appliances, located or situated upon its lands in the city of St. Maries, Idaho, or as a part of said plant, defendant caused to be excavated or dug a certain cistern or well which was used by defendant for the storage of water to be used in operating said milling plant, or for any other purpose or at all.

B. The evidence wholly fails to show that some months or any time prior to the first day of June, 1911, defendant [233] caused all or any of said buildings, machinery or appliances to be moved off of said lands, or carelessly or negligently failed to fill up or cover up said alleged cistern, well or excavation, or carelessly, negligently or recklessly per-

mitted the same to remain open up to or including the time that said Bernarr Thompson was drowned.

C. The testimony fails to prove and does not prove that on June 1st, 1911, or at any other time, while said Bernarr Thompson, in company with other children, was playing upon said premises close to or in the immediate vicinity of said alleged well or cistern, he accidentally or inadvertantly fell into said well or cistern and was drowned, but, on the contrary, the testimony shows that the said Bernarr Thompson, with another boy by the name of Russell C. Moore, did not go to said pool, well or cistern intentionally or by reason of the attractiveness of the sawdust pile near the same, but aimlessly stopped thereat while wandering through the hills and woods, took off their clothes and went in bathing or swimming, and, while doing so, got beyond their depth and were drowned.

D. The evidence is insufficient to show and does not show that either the pool, sink, cistern or well or the sawdust pile, mentioned in the complaint or testified to by the witnesses, attracted the said Bernarr Thompson to the premises where he was drowned, but, on the contrary, he, the said Bernarr Thompson, in wandering through the woods and hills with two other boys, passed near said pool and deliberately and of his own volition went in swimming or bathing and was drowned.

E. That the complaint and testimony in this case show that the plaintiff was guilty of contributory negligence in permitting his son to visit and play in

and about said sawdust pile, pool, hole, well or cistern. [234]

F. That the testimony wholly fails to prove or show that the alleged sawdust pile, pool, hole, cistern or well was attractive or inviting to children, but, on the contrary, said sawdust pile was discolored, blackened and honey-combed with having been on fire, and was uninviting and unattractive.

G. That the testimony wholly fails to show that the alleged attractive or inviting condition of said sawdust pile, pool, hole, cistern or well was the proximate cause of the death of said Bernarr Thompson.

H. That the testimony fails to show that the said Bernarr Thompson met his death by or through any negligence or carelessness on the part of the defendant.

I. The sworn complaint of plaintiff shows upon the face thereof that if said premises were dangerous, the dangerous and unsafe condition thereof was open and notorious and must necessarily have been known to plaintiff, and that plaintiff was guilty of contributory negligence because he did not prevent the said Bernarr Thompson from visiting the same and because he allowed him to visit or frequent the same.

## VII.

The trial Court erred in overruling the motion for a nonsuit renewed by defendant at the close of all of the testimony and upon the same grounds that the original motion for a nonsuit was made, and also in overruling defendant's motion for a directed verdict for defendant upon the same and additional grounds at the close of the whole testimony, because in addi-



tion to the grounds and reasons hereinbefore specified, the evidence was insufficient to warrant a recovery by plaintiff of any sum whatever. [235]

That said evidence was insufficient in the following particulars:

A. The testimony shows that the hole, well or cistern in which said Bernarr Thompson was drowned was not dug or made by defendant, but was made by Schmidt Brothers, independent contractors, and that at the time the same were dug, Schmidt Brothers, as independent contractors, had and held a contract with defendant and were operating, upon the premises where said Bernarr Thompson was drowned, a saw-mill plant of their own, and that the defendant had no interest or ownership in the plant and did not participate in the operation thereof, and took no part in digging, making or maintaining said hole, cistern or well, and had no knowledge of the existence thereof.

B. The evidence shows that defendant never did own or operate any kind of sawmill or woodworking plant or any other kind of plant upon the premises where said Bernarr Thompson was drowned, and, upon ceasing to operate their plant upon said premises said Schmidt Brothers removed the same and their buildings therefrom and securely covered said hole, well or cistern, and that the said covering of the same was removed without the knowledge, fault or negligence of the defendant, and by a person or persons unknown.

### VIII.

The evidence is insufficient to warrant or justify



a verdict or judgment in any sum whatever for the reasons stated in Assignments VI and VII, and further in the following:

(a) The evidence is insufficient to prove and fails to prove that the sawdust pile or hole, cistern, well or sink, or either of them, was inviting or attractive to children and particularly to said Bernarr Thompson.

[236]

(b) The testimony is insufficient to prove and fails to prove that the deceased was attracted to the premises by reason of the sawdust pile or the hole, well or cistern, but, on the contrary, shows that he, with other boys, was rambling through the hills and the woods, and casually and aimlessly came upon said premises and stopped thereat without any pre-conceived intention or purpose of visiting the same.

(c) The evidence is insufficient to prove and fails to prove that said hole, well or cistern was made or dug by the defendant or that said sawdust pile was left by the defendant, or that the said defendant at any time owned or operated a sawmill plant or other plant upon the premises.

(d) The testimony is insufficient to prove and fails to prove that while visiting or walking in, upon or about the premises, the said Bernarr Thompson accidentally fell in any hole, sink, well or cistern thereon, but, on the contrary, shows that after going upon said premises without any prearranged purpose or intent so to do, he first took off his shoes and stockings, and, with the other boys, waded about in the water in said alleged pool, sink, or well, and, after wading about in the water awhile, he and an-

other boy, by the name of Moore, took off their clothes and commenced to bathe or swim in said hole, sink or pool, and got beyond his depth and was drowned.

(e) The testimony is insufficient to show and fails to show that said alleged hole, sink, pool, cistern or well was not properly or securely closed up at the time that Schmidt Brothers abandoned the premises and moved therefrom their plant and other property, but, on the contrary, shows that upon abandoning the premises said Schmidt Brothers securely covered over and fastened a top upon said sink, pool, hole, cistern or well and that thereafter and unknown to said Schmidt Brothers and unknown to the defendant some person or persons uncovered the same, without any [237] fault or negligence whatever on the part of the defendant.

(f) The testimony is insufficient to show and fails to show that the attractive or inviting condition of the sawdust pile, hole, sink, pool, well or cistern, mentioned in the complaint herein, was the proximate cause of the death of said Bernarr Thompson.

(g) The testimony shows that plaintiff was guilty of such contributory negligence in permitting the said Bernarr Thompson to visit and frequent said premises as should and ought to preclude him from recovering in this action.

(h) The testimony is insufficient to show and fails to show that the defendant participated in the operation of said sawmill plant or had any interest therein, or that it dug or participated in the digging of the said hole, sink, well, pool, or cistern, or main-

tained the same, or that it left the sawdust pile upon said premises, but, on the contrary, shows that said Schmidt Brothers held said premises under a contract from defendant; were operating said sawmilling and woodworking plant as independent contractors, dug and made said hole, sink, pool, cistern or well, leaving upon said premises said sawdust pile, and before vacating the premises, securely covered said hole, sink, pool, cistern or well.

(i) The testimony is insufficient to show and does not show or prove any carelessness or negligence on the part of the defendant whatever.

McFARLAND & McFARLAND,  
P. O. Address, Coeur d'Alene, Idaho.

C. L. HEITMAN,  
P. O. Address, Spirit Lake, Idaho,  
Attorneys for Defendant.

[Endorsed]: Filed Sept. 2, 1913. A. L. Richardson, Clerk. [238]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY, a Corporation,

Defendant.

**Admission of Service of Petition for Writ of Error  
and Assignment of Errors.**

Service of the Petition for Writ of Error and Assignment of Errors in the above-entitled action by receipt and retention of a true copy of each and both thereof, at Coeur d'Alene, Kootenai County, State of Idaho, this 30th day of August, A. D. 1913, is hereby admitted.

W. H. PLUMMER,  
WHITLA & NELSON,  
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 2d, 1913. A. L. Richardson, Clerk. [239]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY, a Corporation,

Defendant.

**Order Allowing Writ of Error and Fixing Amount  
of Bond.**

The defendant in the above-entitled action having this day filed in this court and presented its petition for a Writ of Error and its Assignment of Errors, in the above-entitled cause, and prayed that the amount of the bond on said writ of error as well as the amount

of the bond for costs of appeal, damages and interest be fixed:

It is hereby ordered that said petition be allowed and said writ granted as prayed for, and that the amount of said bond on said writ of error be, and the same is hereby fixed at Three Thousand Dollars, the said bond, when executed, to operate as a super-sedeas of said judgment, as well as a bond for costs of appeal, damages and interest.

Done this 17th day of September, A. D. 1913.

FRANK S. DIETRICH,

United States District Judge for the District of Idaho, Who Tried Said Cause and Entered Said Judgment.

[Endorsed]: Filed Sept. 17, 1913. A. L. Richardson, Clerk. [240]

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*In the District Court of the United States for the District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

COEUR D'ALENE LUMBER COMPANY, a Corporation,

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that we, Coeur d'Alene Lumber Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation created, incorporated, organized and existing under and by virtue of



the laws of the State of Maryland and authorized to do business as a surety company in the State of Idaho, as surety herein, are held and firmly bound unto O. J. Thompson, the above-named plaintiff, for the just and full sum of Three Thousand Dollars (\$3,000.00), to be paid unto the said above-named O. J. Thompson, his certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and dated this 2d day of October, in the year of our Lord, 1913, upon the following conditions:

Whereas, lately at a session of the District Court of the United States for the District of Idaho, Northern Division, in a suit or action pending in said court between the said O. J. Thompson as plaintiff, and the said Coeur d'Alene Lumber Company, a corporation, as defendant, a judgment was rendered against [241] said defendant upon the verdict of the jury, in the sum of Twenty-five Hundred Dollars (\$2,500) and costs, amounting to the sum of Two Hundred Forty-one Dollars and Eleven Cents (\$241.11);

And whereas, said defendant, conceiving itself aggrieved thereby, has obtained from said court a Writ of Error to reverse and correct said judgment in that behalf, and a citation directed to the said above-named plaintiff admonishing him to be and appear at the United States Circuit Court of Appeals of the Ninth Circuit, to be holden at San Fran-

cisco, in the State of California, within the time therein fixed;

Now, therefore, the conditions of the obligations are such that if the said Coeur d'Alene Lumber Company, a corporation, defendant herein, shall prosecute its said Writ of Error to effect and answer all damages and costs if it fails to make its plea good in said court, then the above obligation to be void; otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and as a supersedeas bond in accordance with the order of the Honorable F. S. DIETRICH, Judge of said Court, made and dated the 17th day of September, 1913.

COEUR d'ALENE LUMBER COMPANY,  
a Corporation,

Principal.

[Seal]

By W. H. WAKEFIELD,

As Its Secretary.

FIDELITY AND DEPOSIT COMPANY  
OF MARYLAND, a Corporation,

Surety.

[Seal]

By ROBT. H. ELDER,

Attorney in Fact.

By H. V. CHAMBERLIN,

Agent.

Approved, Oct. 6, 1913.

DIETRICH,

Judge.

[Endorsed]: Filed, Oct. 6, 1913. A. L. Richardson, Clerk. [242]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

O. J. THOMPSON,

Plaintiff,

vs.

THE COEUR d'ALENE LUMBER COMPANY,  
a Corporation,

Defendant.

**Praeceptum for Transcript.**

To A. L. Richardson, Clerk of said Court:

Please prepare transcript in the above-entitled cause to be used on defendant's appeal to the Circuit Court of Appeals and incorporate therein the following papers: Complaint, demurrer to complaint, amended answer, order of Court overruling demurrer to complaint, and all orders and record entries made prior to the trial of the action; bill of exceptions after the same is settled by the Judge and all stipulations made and entered into by and between respective counsel both prior, during and subsequent to the trial, orders of Court extending time for preparing and serving bill of exceptions, and any other orders or record entries made since the trial; defendant's assignment of errors, petition for writ of error and order allowing writ of error, also writ of error, bond on writ of error, citation on writ of error and Clerk's certificate to transcript.

Dated this 9th day of September, 1913.

McFARLAND & McFARLAND,

Coeur d'Alene, Idaho,

CHAS. L. HEITMAN,

Spirit Lake, Idaho,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 2, 1913. A. L. Richardson, Clerk. [243]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

COEUR d'ALENE LUMBER COMPANY,

Plaintiff in Error,

vs.

O. J. THOMPSON,

Defendant in Error.

**Writ of Error [Original].**

The United States of America,

Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea, which is in the said District Court before you or some of you, between O. J. Thompson, plaintiff, and Coeur d'Alene Lumber Company, defendant, a manifest error hath happened, to the great damage of the Coeur d'Alene Lumber Company, plaintiff in error, as by its complaint appears, we being willing that

error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together [244] with this writ, so that you have the same at San Francisco, on the 5th day of November, 1913, in said Circuit Court of Appeals for the Ninth Circuit, to be then and there held, that the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 6th day of October, 1913, of the Independence of the United States the one hundred thirty-eighth year.

[Seal]

A. L. RICHARDSON,

Clerk U. S. District Court, District of Idaho.

Allowed by:

FRANK S. DIETRICH,

District Judge. [245]

[Endorsed]: No. 544. Original. In the United States District Court, District of Idaho, Northern Division. *Coeur d'Alene Lumber Company*, Plaintiff in Error, vs. *O. J. Thompson*, Defendant in Error. Writ of Error. Filed October 6th, 1913. A. L. Richardson, Clerk. [246]



*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

COEUR d'ALENE LUMBER COMPANY,  
Plaintiff in Error,

vs.

O. J. THOMPSON,  
Defendant in Error.

**Admission of Service of Citation and Writ of Error.**

Service of the Citation and Writ of Error in the above-entitled action by receipt of a true copy thereof at Coeur d'Alene, Kootenai County, State of Idaho, this 8th day of October, A. D. 1913, is hereby admitted.

WHITLA & NELSON,  
Attorneys for Defendant in Error. [247]

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*In the United States Circuit of Appeals for the  
Ninth Circuit.*

COEUR d'ALENE LUMBER COMPANY,  
Plaintiff in Error,

vs.

O. J. THOMPSON,  
Defendant in Error.

**Citation [Original].**

The President of the United States, to O. J. Thompson and W. H. Plummer and Ezra R. Whitla,  
His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of

San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, wherein O. J. Thompson is plaintiff and defendant in error, and the said Coeur d'Alene Lumber Company, is defendant and plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error, mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 6th day of October, 1913, of the Independence of the United States the one hundred and thirty-eighth year.

FRANK S. DIETRICH,

District Judge.

[Seal]

Attest: A. L. RICHARDSON,

Clerk. [248]

[Endorsed]: No. 544. Original. In the United States District Court, District of Idaho, Northern Division. Coeur d'Alene Lumber Company, Plaintiff in Error, vs. O. J. Thompson, Defendant in Error. Citation. Filed October 10, 1913. A. L. Richardson, Clerk. [249]

**Return to Writ of Error.**

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal]                      Attest: A. L. RICHARDSON,  
Clerk. [250]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

*In the District Court of the United States, District  
of Idaho, Northern Division.*

**THE COEUR d'ALENE LUMBER COMPANY,**  
Plaintiff in Error,

vs.

**O. J. THOMPSON,**

Defendant in Error.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 251, inclusive, contain true and correct copies of the Complaint, Demurrer to Complaint, Order Overruling Demurrer, Stipulation Extending Time to Answer, Amended Answer, Verdict, Judgment, Order Extending Time to Propose and Serve Bill of Exceptions, Stipulation, Stipulation as to Costs, Order Extending Time to Serve Bill of Exceptions, Bill of Exceptions, Petition for

Writ of Error, Assignments of Error, Admission of Service of Petition for Writ of Error and Assignments of Error, Order Allowing Writ of Error and Fixing Amount of Bond, Bond on Writ of Error, Praeceptum for Transcript, Writ of Error, Citation, Return to Writ of Error and Clerk's certificate, in the above-entitled cause, which together constitute the transcript of the record.

I further certify that the cost of the record herein amounts to the sum of \$153.50, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said court this 11th day of October, 1913.

[Seal]

A. L. RICHARDSON,  
Clerk. [251]

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[Endorsed]: No. 2326. United States Circuit Court of Appeals for the Ninth Circuit. Coeur d'Alene Lumber Company, a Corporation, Plaintiff in Error, vs. O. J. Thompson, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

Received October 18, 1913.

F. D. MONCKTON,  
Clerk.

Filed October 18, 1913.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

IN THE  
**United States Circuit Court of Appeals**  
FOR THE  
NINTH CIRCUIT.

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COEUR D'ALENE LUMBER COMPANY, a Corporation,

*Plaintiff in Error,*

'S.

O. J. THOMPSON,

*Defendant in Error.*

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**BRIEF FOR PLAINTIFF IN ERROR.**

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STATEMENT OF THE CASE.

Defendant in Error is the father of a minor son, who, at the time of his death was about eight years of age. The Defendant in Error lived, with his family, in the City of St. Maries, Idaho, his home being about six blocks and a half from the place where the boy was drowned (Transcript, pages 52-61). The Plaintiff in Error owned the land upon which the pool of water in which the boy was drowned was situated. A sawmill plant, belonging to Schmidt Brothers, independent contractors, under the Plaintiff in Error, had been operated on the land for a year, or more, sometime prior to the accident, and the pool of water complained of was



caused by Schmidt Brothers digging a deep hole, out of which a natural spring rose, and into which a small natural stream flowed, for the purpose of supplying water for the boiler of their engine. A large quantity of saw dust from the manufactured lumber of Schmidt Brothers had accumulated at this place, and the pool of water was partially surrounded by this sawdust (Transcript, pages 58, 129). This sawdust was situated on the unoccupied vacant land of Plaintiff in Error. (Transcript, page———). There was an open plain, or commons, between the city and the sawdust, on which commons children from the city were accustomed to play. (Transcript, page 119), and the evidence shows that children played on that part of the sawdust sloping toward the city. (Transcript, page 127). The Sawdust had caught on fire in the summer of 1910, and continued to burn up to the time of the accident. (Transcript, pages 125, 198). The sawdust was blackened by this fire, and holes and small caves had been burnt therein. It had become discolored by the elements, and was to some extent in a decayed and decaying condition. (Transcript, pages 108, 136, 198). On the day of the accident, June 1, 1911, the minor son of Defendant in Error, in company with the Moore boy, who was also drowned, and another boy, Kenneth Warner, still younger, went to the hills beyond the sawdust, for the purpose of playing, and took their lunch with them. (Transcript, pages 70, 85). After remaining upon the hills for some time, they wandered slowly and aimlessly around until they reached this water, where they ate their lunch; (Transcript, pages 85, 86)

then all the boys pulled off their shoes and stockings and began wading in the water, and, tiring of this, the Thompson boy, son of Defendant in Error, and the Moore boy, pulled off their clothes, and went in the water for the purpose of swimming, and fell into this pool, or well, or cistern, as it is variously called, and both were drowned (Transcript, page 87). The pool or well was about six or eight feet deep, five or six feet wide and twelve to fifteen feet in length (Transcript, page 98, 104, 192). The water was somewhat muddy, and covered, to some extent, with scum, and floating sawdust. (Transcript, pages 59, 117, 126, 136). The nearest traveled public highway or street was Eighth Street of the City of St. Maries; the end of which was about three hundred feet from the sawdust and the water (Transcript, page 56). The Defendant in Error, in his original complaint, charged that the Plaintiff in Error had dug this well, or cistern, and subsequently and prior to June 1, 1911, removed the sawmill plant from this land, but negligently failed to fill or cover said well or cistern, and negligently permitted it to remain open up to the time that the boy, Bernarr Thompson, was drowned (Transcript, page 2). That, at the time of the accident, the well or cistern was full of water, about ten feet deep, extremely dangerous to children of tender years and others who went upon said premises for business or pleasure, and that said lands were dangerous premises. (Transcript, page 3); that, for many months prior to the accident, the minor son of Defendant in Error, with numerous other children, frequently and habitually went upon

and across said premises to the vicinity of said well or cistern, for the purpose of play and amusement. (Transcript, page 3). That a large amount of sawdust had accumulated from the sawmill plant, and was an attractive place for children of tender years to congregate and play, and that such children did habitually play upon said lands, and that the well or cistern was partially surrounded by the sawdust, and, by reason of the location of said sawdust the lands of Plaintiff in Error attracted children thereto to play. (Transcript, page 4); that the dangerous condition of said premises and the danger of small children falling in said well and becoming drowned, and the habitual use of said premises by said Bernarr Thompson, and other children was open and notorious up to the time of the death of said Thompson, and was well known to Plaintiff in Error; that on June 1, 1911, said Bernarr Thompson was playing with other children on said premises, and in the immediate vicinity of said well or cistern, which, at the time, was filled with water on a level with the ground; that said Bernarr Thompson, while so playing, accidentally and inadvertently fell into said well or cistern and was drowned; that by reason of the death of said Bernarr Thompson, caused by the negligence of Plaintiff in Error, Defendant in Error was damaged in the sum of ten thousand dollars (Transcript, pages 4-5).

For a better understanding of the issues, Plaintiff in Error, shows that the Pleadings contain, in substance, the following allegations:

Defendant in Error filed his Complaint herein, on

the 22nd day of June, 1912, in which he alleged his residence to be in Idaho, and that he was the father of Bernarr Thompson, a minor, then deceased; that the Plaintiff in Error was a Washington corporation; that prior to June 1, 1911, the said Bernarr Thompson was living with the Defendant in Error, his father, at St. Maries, Idaho; said Bernarr Thompson being at the time of his death eight years of age; that for some time prior to June 1, 1911, the Plaintiff in Error owned, operated and maintained a sawmill plant, consisting of buildings, machinery and appliances situated upon lands of the said Plaintiff in Error, in the City of St. Maries, and that, as part of said Plant, Plaintiff in Error had caused to be excavated a cistern or well which was used for the storage of water; said water being used in operating said sawmill plant. That some months prior to June 1, 1911, Plaintiff in Error caused all of said buildings, machinery and appliances to be moved from said lands, but carelessly and negligently failed to fill or cover said cistern or well, and carelessly, negligently and recklessly permitted said cistern or well to remain open up to the time that said Bernarr Thompson was killed; that, at the time of his death, said well or cistern had become filled with water, was about ten feet deep, and maintained by Plaintiff in Error recklessly, and negligently, and carelessly, and was extremely dangerous to children of tender years, and to others who had occasion to go upon or about said premises for business or pleasure, and that said lands constituted and were dangerous premises; that, for many months prior to the death of said Bernarr



Thompson, he, with numerous other children living in said town, would frequently and habitually go upon and across said lands to the vicinity of said well or cistern for the purpose of playing and amusement, all of which was known by Plaintiff in Error and could have been known in the exercise of reasonable care, and ought to have been, and was anticipated by said Plaintiff in Error, its agents and servants; that in addition to said well or cistern, so located on said land, a large amount of sawdust had accumulated from the lumber mill theretofore there located; that said sawdust was strewn and scattered around and upon said land; and surrounded said well or cistern in large piles, and constituted and was an attractive and inviting place for children of tender years to congregate and play, and children of tender years did habitually play upon said lands, and said well or cistern was located adjoining said sawdust pile, so that it partially surrounded the well or cistern, and by reason of the location of said sawdust pile, said lands attracted children thereto to play there on and upon said sawdust pile surrounding said well or cistern; that the dangerous condition of said premises, and the danger of small children falling in said well or cistern, and becoming drowned, and the habitual use of said premises by said Bernarr Thompson, and other companions and children of tender years, was open and notorious up to the time of the death of said Bernarr Thompson, and was well known to Plaintiff in Error, but, that on account of the tender years of said Bernarr Thompson, he did not know or appreciate the dangerous conditions of said premises,



or injury or death resulting from being in or upon said premises, and in and about said well or cistern, but, that, nevertheless, Plaintiff in Error utterly failed, neglected and refused to cover or fill said dangerous well or cistern, which negligence and carelessness on the part of the Plaintiff in Error was the proximate and sole cause of the death of said Bernarr Thompson; that on June 1, 1911, said Bernarr Thompson, in company with other children playing in, about and upon said premises and close to and in the immediate vicinity of said well or cistern, which was then filled level with the ground with water, and said Bernarr Thompson while so playing therein and thereabout accidentally and inadvertently fell into said well or cistern and was drowned; that by reason of the death of said Bernarr Thompson by the recklessness, negligence and carelessness, and the wrongful act of Plaintiff in Error, Defendant in Error was damaged in the sum of ten thousand dollars. (Transcript, pages1-6).

During the progress of the trial, the Complaint, over the objection of Plaintiff in Error, was amended by interlining paragraph seven (7), which interlineation is as follows:

“That in addition to said well so located on said land of the defendant a large amount of sawdust has been accumulated from the lumber mill theretofore located on said land, and said sawdust was strewn and scattered around and upon said land and surrounding said well as aforesaid in large piles, and constituted and was an attractive and inviting place for children of tender years to congregate and play, and children of

tender years did habitually play upon the lands of said defendant, and the well or cistern herein complained of was located adjoining said sawdust pile so that said sawdust pile partially surrounded the same, and by reason of the location of said sawdust pile the lands of defendant attracted children thereto to play thereon and upon said sawdust pile surrounding said well or cistern." (Transcript, page 146).

The Complaint was further amended by striking from paragraph eight (8) the following language: "Was open and notorious up to the time of the death of Bernarr Thompson and" (Transcript, page 158).

To the original complaint, Plaintiff in Error, demurred upon the grounds of insufficiency of facts, and that the Complaint was uncertain, unintelligible, and ambiguous in that it did not allege how long prior to June, 1, 1911, Plaintiff in Error, owned, operated or maintained its mill plant, and that said Complaint did not show how long prior to said date Plaintiff in Error caused the buildings, machinery and appliances mentioned in said Complaint to be removed from its said lands, and that it did not appear from the Complaint in what manner, or how, or by what means, Plaintiff in Error recklessly, negligently or carelessly maintained said well or cistern. (Transcript, pages 6-7).

This demurrer, after argument, was overruled (Transcript, page 8), and Plaintiff in Error filed its Amended Answer, in which it denied, for lack of information or belief, that, prior to June 1, 1911, Bernarr Thompson lived with his father, Defendant in Error, in the City of St. Maries, and that said Bernarr

Thompson was, at the time of his death, a minor child of the age of eight years, or the son of Defendant in Error, and said Amended Answer denied that Plaintiff in Error for sometime prior to June 1, 1911, or at any time, owned, operated, or maintained that certain sawmill plant, consisting of buildings, machinery, appurtenances, or appliances located upon lands of Plaintiff in Error, in the City of St. Maries, Idaho, or that, as a part of said plant, Plaintiff in Error caused to be excavated, or dug, any well or cistern which was used by Plaintiff in Error for the storage of water to operate said mill plant, or otherwise, or at all.

Said Amended Answer denied that some months prior to June 1, 1911, or at any time, Plaintiff in Error, caused all or any of said buildings, machinery, or appliances to be moved from said lands, or that it carelessly, or negligently failed to fill or cover said well, or cistern, or carelessly, or negligently, or recklessly, or otherwise, or at all, permitted said well or cistern to remain open up to or including the time that said Bernarr Thompson was killed, or at any other time.

The Amended Answer denied that at the time of the death of said Bernarr Thompson, or at any other time, said well or cistern had filled with water, or was of the depth of ten feet, or any other depth, or was maintained by Plaintiff in Error, carelessly, negligently or recklessly, or otherwise, or at all, or that it was extremely dangerous to children of tender years, or at all, or to others who had occasion to go, in, or upon said premises for business or pleasure, or otherwise, or at all, or that said lands constituted or were dangerous premises. (Transcript, pages 9-11).

The amended Answer denied that for many months prior to the death of said Bernarr Thompson he, with other or numerous children, living in said city, would frequently or habitually go upon, or across said lands of Plaintiff in Error for play or amusement, or that these alleged facts were known to Plaintiff in Error, or could have been known in the exercise of reasonable care, or ought to have been, or was anticipated by Plaintiff in Error, its agents or servants, or otherwise, or at all, and denied that the Plaintiff in Error knew that said Bernarr Thompson, or any other child or children living in said town, or elsewhere, would frequently, or habitually go upon or across said lands, in the vicinity of said alleged well or cistern, for the purpose of play or amusement, or otherwise, and denied that Plaintiff in Error could have known, with the exercise of reasonable care, that said Bernarr Thompson, or any other child or children would frequently, or habitually, or otherwise, or at all, go upon or across said lands, or that such fact or facts ought to have been or was anticipated by Plaintiff in Error, its agents, or servants. (Transcript, page 12).

The Amended Answer denied that the alleged dangerous or any condition of said premises, or the danger of small children falling into said alleged well or cistern, or becoming drowned, or the habitual use of said premises by said Bernarr Thompson, or other companions or children of tender years was open or notorious up to the time of the death of the said Bernarr Thompson, or otherwise, or that it was well known to Plaintiff in Error, and denied that on account

of the alleged tender years said Bernarr Thompson, he did not know or appreciate the said alleged dangerous conditions of the said premises, or injury or death resulting from being in or upon the same, or in or about said well or cistern, and denied that said premises were in a dangerous condition, and that Plaintiff in Error utterly, or at all, failed, neglected or refused to cover or fill said alleged dangerous well or cistern, and denied that the alleged negligence, or carelessness upon the part of Plaintiff in Error, or any negligence, or carelessness on its part was the approximate or sole or any cause of the death of the said Bernarr Thompson. (Transcript, pages 12-13).

The Amended Answer denies that on June 1, 1911, or at any time, said Bernarr Thompson, in company with other children playing in or about said premises, or close to or in the immediate vicinity or said alleged well or cistern accidentally or inadvertently fell into said well or cistern, or was drowned. (Transcript, page 13).

The Amended Answer denied that by the death of said Bernarr Thompson, or the alleged negligence, carelessness, or wrongful act of Plaintiff in Error, Defendant in Error had been damaged in the sum of ten thousand dollars, or any other sum, and denied that the death of said Bernarr Thompson was caused by the recklessness, negligence, carelessness or wrongful act of Plaintiff in Error, or otherwise. (Transcript, page 14).

The Amended Answer, for further defense, alleged that Plaintiff in Error was the owner of certain land



therein described, situated in Kootenai County, State of Idaho; that on September 14, 1907, Plaintiff in Error entered into a written contract with William Schmidt and Edward Schmidt, co-partners under the firm name of Schmidt Brothers, to manufacture lumber for Plaintiff in Error from all the logs on certain lands there described; that thereupon Schmidt Brothers located their sawmill on lands there described, and immediately commenced operating said sawmill and manufacturing logs into lumber, and so continued up to and including part of the month of October, 1908; that in the operation of said sawmill, by Schmidt Brothers, and without the knowledge of Plaintiff in Error, sawdust accumulated in piles adjacent to said sawmill; that back of said sawmill there was a small ravine through which water flowed, and it sloped from the hillside toward the mill site of Schmidt Brothers, and terminated, at the piles of sawdust, into a small pond or sink. That said pond so formed was about twenty-five or thirty feet long by about twelve or fifteen feet wide, and that at all the times mentioned, remained open, unenclosed and uncovered, and was and is off and out of the way of any public highway, road, street or alley; that said pond was caused by said Schmidt Brothers leaving upon said land piles of sawdust against which the water in said ravine flowed, stood and remained; that if Schmidt Brothers dug or left upon said premises any holes, or well, or cistern, Plaintiff in Error had no knowledge thereof. (Transcript, pages 14-15).

The Amended Answer further alleged that in October, 1908, Schmidt Brothers ceased operating said

sawmill and removed their sawmill plant from said premises, but left remaining there said piles of sawdust and pond or sink; that at no time had Plaintiff in Error operated, or owned, or participated in the operation of a sawmill in, or on said premises, and that Plaintiff in Error had not, at any time, caused to be dug, or made, or kept, or maintained upon said premises, or any part thereof any well, or cistern, or pond, or sink. (Transcript, page 16). That Plaintiff in Error did not know, nor had no means or opportunity, of knowing or ascertaining that said Bernarr Thompson, or any other boy or boys, or child or children, were in the habit of going upon or frequenting said premises, and had no knowledge or means of knowing or ascertaining that said Bernarr Thompson, or any other child, or children, had ever, at any time, been upon said premises, or any part thereof. (Transcript, page 16).

The Amended Answer, upon information and belief, alleges, that on or about June 1, 1911, the said Bernarr Thompson, and another boy named Russell G. Moore, unknown to Plaintiff in Error, and to said Schmidt Brothers, entered upon said premises, removed and took off their stockings and shoes, and went wading in and through said pond, and, while so wading in said pond, were drowned, without any fault or negligence on the part of the Plaintiff in Error. (Transcript, pages 16-17).

The amended Answer alleges that Defendant in Error, at all times mentioned in his Complaint, knew of the existence of said pond or sink, and that said Ber-

narr Thompson was in the habit of going upon said premises, and that it was the duty of Defendant in Error to exercise care, control and supervision over said Bernarr Thompson, and to prevent and restrain him from entering said premises, and from going near, in or about said pond, but that Defendant in Error, disregarding his duty, carelessly, negligently and knowingly permitted said Bernarr Thompson to frequent said premises, and to go wading in said pond, and carelessly and negligently omitted to prevent and restrain said Bernarr Thompson from entering said premises and wading in said pond, by reason whereof said Bernarr Thompson did enter said premises, and got into said pond to wade and was drowned, and that the carelessness and negligence of Defendant in Error in failing and omitting to control, take care of, and exercise supervision over the said Bernarr Thompson, and in carelessly and negligently omitting to prevent and restrain said Bernarr Thompson from entering said premises and swimming in said pond contributed to and were the approximate causes of the death of the said Bernarr Thompson. (Transcript, pages 17-18).

The Court further allowed the Defendant in Error to amend his complaint by interlining the following: "That by reason of the sawdust in the vicinity of the well or alleged well, the premises were attractive to children." (Transcript, page 42).

The cause was tried before the Court, sitting with a jury, and a verdict was rendered against the Plaintiff in Error and in favor of Defendant in Error in the sum of two thousand five hundred dollars, and judg-

ment was entered upon said verdict. (Transcript, pages 19-21).

The evidence introduced on the trial of the case was substantially as follows:

James C. Hunt, testifying for Defendant in Error, stated that he had resided at St. Maries since 1905, engaged in the lumber business, had been employed by the Plaintiff in Error from November, 1905, during 1906, 1907, until in the summer of 1908, in the capacity of wood superintendent, was familiar with the land where the accident happened. There was no mill moved away from that land during the time he was superintendent of Plaintiff in Error. The mill was there when he severed his connection with the Plaintiff in Error. "I dug a well there on those premises in the summer of 1908; it was about one hundred feet up the valley from the present sawdust pile." (Transcript, pages 40-43). The witness knew of another well being dug there where sawdust now surrounds it. It was dug by Schmidt Brothers and was dug about the time I dug the one heretofore mentioned. I did not see it dug. I saw it only casually. It was dug to get water for Schmidt Brothers' boiler. (Transcript, pages 43-44).

On cross-examination, he testified, that these wells, holes, or cisterns were about one hundred feet apart; that the larger one was nearer to the city of St. Maries, that is the one supposed to have been dug by Schmidt Brothers. I did not see Schmidt Brothers dig the hole, but saw them clean it out. Probably two weeks or more after the hole had been dug. The

Coeur d'Alene Lumber Company did not dig that hole. (Transcript, pages 44-46).

On re-direct examination witness testified that he was superintendent of the upper river business of the Coeur d'Alene Lumber Company, that is, its logging, river driving, and seeing that the lumber was properly sawed and piled. Schmidt Brothers was sawing the lumber on this ground that I was looking after. It was being sawed for the Coeur d'Alene Lumber Company. The sawmill presumably belonged to Schmidt Brothers. It did not belong to the Coeur d'Alene Lumber Company. (Transcript, pages 46-48).

Mrs. Clara Thompson, testified for Defendant in Error, am the wife of O. J. Thompson, plaintiff in the cause, the mother of the little boy, Bernarr Thompson; recall his death, he died from drowning; he was seven years of age, he was a bright, strong healthy lad. (Transcript, pages 49-50). He was very bright in his studies; I never knew of the boy going on those premises to play before the day he was drowned. We lived five or six blocks from that place. (Transcript, page 52).

Oliver J. Thompson, Defendant in Error, testified substantially as follows: The boy, Bernarr Thompson, who was drowned, was my son; he was seven years of age; he lived with my wife and I, at St. Maries, at the time. I am familiar with the town, have lived there five years. The map exhibited to me, I procured from the City Clerk of St. Maries; it is a correct plat of the city; the sawdust pile is at the end of Eighth Street, and in the center of that Sawdust pile is the



well or the hole that the boys were drowned in. This hole or well is, as near as I can guess, between 275 and 300 feet from the end of Eighth Street and the City Limits (Transcript, pages 54-56). There are houses there up to the cemetery (Transcript, page 56). I was at the place of the accident shortly after, about an hour after the boys were taken out of the water. I saw the sawdust pile there; there was a very big pile on the north side of the hole, not quite so large on the east and around the south side, but it was higher, several feet higher than the water. There is a big area there scattered with sawdust. There were holes dug in the sides of the pile where the boys had been playing, digging out caves and slides where they had slid down from top to bottom (Transcript, pages 57-58). When I got there the boys were just at the edge of the water; it was not clear; I could not see down in the water very deep. The sawdust went down into the sides of the water, and we could possibly see in maybe two feet from the edge of the water. You could see probably a foot in the water. This body of water was, I should judge, about eight feet wide and probably twice that long. (Transcript, pages 58-59); I was up there a day or two after the accident, and took a long piece of board and measured, as far as I could figure, it was about six or eight feet deep. It didn't seem to be more than five or six feet across the deep part. I had never known my boy to go up there and play before. At the time I lived about six and a half blocks from this water. (Transcript, pages 60-61). At the time of the accident the popu-

lation of St. Maries was about fifteen hundred. I didn't have any business; I had been selling the "Spokesman Review"; my boy was a very bright boy, physically perfect and upright, polite and nice to everybody and everybody had a kind word for him. (Transcript, pages 68-69).

On cross-examination, witness testified substantially as follows: At the time I found the boys up there at the pool they did not have their clothing on. My boy did not swim. (Transcript, page 69).

Andrew Warner testified for Defendant in Error substantially as follows: I am a Methodist Minister. In June, 1911, I resided at St. Maries, Idaho; I have a son, Kenneth, nine years of age; I was present at St. Maries on June 1, 1911, shortly after the drowning of the Moore boy and the Thompson boy. In the morning of that day the boys having been playing "lumber jack" and "cow boy," decided that they would be real "lumber jacks" and "cow boys" and go out on the hill back of the church, take their dinners with them and their blankets with them for tents and spend the day there. I mean by the boys, my boy, Kenneth, and the two boys that were drowned. They went up about half past ten or eleven o'clock. We thought it was perfectly safe for them to go up in this direction, being back of the church and away from the river and the roads. About one o'clock my boy came rushing to the house, which was about two hundred yards from the sawdust pile, and said that Russell and Bernarr were drowned in the sawdust pile. I ran to the sawdust and when I came to the

top of the pile, I saw this little pool of water, the boys' clothing was there. I picked up a stick and thrust it in the pool and it went down a few inches; then I thrust it out a little further and it went down and I threw off my coat and waded into the pool and fell in and my feet touched on a limb, or a log, upon which I rested and searched about with my foot until I found one body. When I fell in I fell up to my neck and my head was out of water. I found the two bodies and brought them up. The pool of water was shallow near the edge and I had stepped in but a short distance when I fell in; I didn't wade in, but fell in. The pool was straight down or nearly so. (Transcript, pages 69-73). There was nothing in there to indicate the existence of a well, excepting the pool of water of a shallow character. To the north side of the well there was a pile of sawdust several feet high, to the south side there was also sawdust; the sawdust pile was a few feet high. It covered quite a large area, hardly an acre. I had lived there at this time nine months immediately preceding the accident; I don't recall when the mill was moved away. (Transcript, pages 74-75). There was no fence around the plot of ground adjacent to the sawdust pile, and folks quite commonly were in that section walking across it. It was used rather publicly. I think there was a road running about near there. I don't know that it was a public road, there was a path a short distance beyond the sawdust pile, I can't say just how many feet. I don't recall any particular individuals that I saw around there; I don't

recall any particular time that I saw children playing there, but I saw evidence of their having played there. There were pits in the sawdust pile that I remember seeing. (Transcript, pages 76-77).

On cross-examination witness testified substantially as follows: The pool was longer than it was wide; in going into the water I approached it from the corner. I had taken only a few steps before I fell into the hole. I recall that as I put the stick down in the edge of the water it was only a few inches deep, perhaps six or eight or maybe ten, I don't know just how wide the pool was. It doesn't occur to me that it was more than ten or twelve feet wide. There was water all about the pool, as I recall it; I couldn't say whether the pool was thirty feet long. When I discovered the boys they did not have any clothing on. Their clothing was on the sawdust pile. At this time there were several families living nearer than we lived. The Burnham family lived probably one hundred yards from this place. (Transcript, pages 77-80). There was a road that went up into the hills from the sawmill. This road was several feet from the pool. I think there was a road that had been constructed and used by Schmidt Brothers, the sawmill people. (Transcript, pages 80-81). I got out of this pool very readily, but it would be difficult for children to get out. The hole was too deep for children to get out readily. (Transcript, pages 81-82).

Kenneth Warner testified for the Defendant in Error, substantially, as follows: I am nine years old; I lived at St. Maries; I never testified in Court as a

witness; I understand the obligation of an oath; I remember things that happened two years ago. (Transcript, pages 82-83). I and the two boys, the Moore boy and the Thompson boy, that forenoon had been playing up on the hill; we went over by the sawdust pile to play around there. We played "cow boy" and "lumber jack"; ran around over the sawdust pile. I had never been there before. After we played cow-boy and lumberjack we had our lunch on the sawdust pile. (Transcript, pages 84-85). After we ate lunch we went over to the sawdust pile and saw this pool. We waded in the water at first. I did not see anything there to show that there was a deep hole. The water where we waded was about six inches deep. After I and the boys waded around awhile they took off their clothes and went in swimming. Barnarr went in first and Russell Moore tried to help him out. I thought he was drowning because he made a motion when he was in the water. The Moore boy drowned with him. I ran to tell my father. (Transcript, pages 84-87).

On cross-examination witness testified substantially as follows: When I waded around in the water I took off my shoes and stockings. After the other boys had taken off their clothing I stayed out on the bank. Barnarr took off his clothes first, went in the water and tried to swim around in there. (Transcript, page 87). When the Thompson boy was trying to swim, the Moore boy was watching him. He was out on the bank, but he was in the water when the Thompson boy commenced to drown. He also



was trying to swim. He was trying to pull the Thompson boy out. The Thompson boy did not say anything, did not speak or holler or cry out in any way. He made motions with his hands, waved his hands, struck the water when he was waving his hands. (Transcript, pages 88-89). I did not see the boys when they were drowned. I think Russell Moore drowned first. The Thompson boy was near in the middle of the pool when he began to wave his hands. I don't know how long I had known these two boys before that day. I was in the habit of playing with them every day most. (Transcript, page 91); I and Russell Moore went to school together that year, but Bernarr did not. Our school had been out about three or four days before the boys drowned. I played with the Moore boy and the Thompson boy those three or four days after school let out and up to the time they were drowned. I lived about half a block from the Moore boy. I did not go to the Thompson boy's home often, but he came to my house often. I went to the Moore boy's house often, and he came to my house often. We played together almost all the time. We happened to go to the sawdust pile in this way. The other boys were over to Moore's house and I went over there and they asked me if I wanted to go. I do not remember what there was that made us want to go to the sawdust pile, after we had gone to the hills. (Transcript, pages 90-94). It was before noon when we started away from home to go up in the hills, about nine thirty or ten o'clock. When we got up

in the hills we played around there and then went over to the sawdust pile. We did not stop at any other place before we reached the sawdust pile. We went slow as we went along. (Transcript, pages 94-95).

George F. McClure testified for Defendant in Error, substantially as follows: I resided at St. Maries seven years, was there in 1907 and 1908. I worked for Schmidt Brothers and dug wells for them. I know of the sawdust pile just outside of the city limits, south of the city. I dug a well there where the sawdust is now surrounding the place. It was about eight or nine feet deep; it was six or seven feet in diameter. I saw it quite a few times afterwards. I do not know that it was ever covered or filled up. I lived about ten minutes walk from this hole, did not live in sight of the sawdust. I think it was two or three hundred yards distant. I was not very well acquainted with the people who lived in that vicinity at that time. In 1908, when this hole was dug there were not many people living near it. The Schmidt Brothers lived near this sawdust pile and pool. I think one of them had a family. (Transcript, pages 96-99). The hole or pool was, I should say, a block or two from the end of the nearest street in St. Maries. There was a little valley up above this hole and a little stream that trickled down the valley and into this hole in wet weather. (Transcript, page 100). I do not know when Schmidt Brothers moved their mill away; it must have been a year or so after I dug this hole or well. (Transcript, page 101).

Frank B. Jones testified for the Defendant in Error

substantially as follows: I live at St. Maries; recall the drowning of the Moore boy and the Thompson boy, two years ago. I lived about three hundred yards from the place where they were drowned. I recall the time the mill was moved away; it must have been a couple of years or three before the boys were drowned. I watched fire on that sawdust pile for the Coeur d'Alene people, and, in watching the fire there were more or less boys that played around the sawdust pile and on those grounds. I also worked there in the cemetery and I often saw boys playing there. There would sometimes be half a dozen, sometimes more, and sometimes less. I watched the fire there for the Coeur d'Alene Lumber Company twelve or fifteen days. This fire was after the big fire, the big forest fire in 1910. This sawdust pile was on fire. Children did play there off and on. You could see them there every day perhaps, and then perhaps there would be a vacancy, they wouldn't be there. (Transcript, pages 101-103). I measured this hole, and I should think it was six or eight or ten feet deep. When I was there watching the fire the sawdust had got down to the water and there was practically no water at all because the sawdust covered the water to a great extent. You could dip down through the sawdust and dip water. The sawdust went clear down as far as you could see in the water. You could not see bottom at all. The diameter of the well part was not more than four or five feet, and it was perhaps six or seven feet long. (Transcript, pages 103-105).

On cross-examination witness testified substantially as follows: I worked in the cemetery there in 1910, but not every month and not every day in any one month. I was opening and clothing graves there and whenever there was a funeral I opened the grave. I was there probably three weeks. The cemetery is fifty or sixty yards from this water. The fire I mentioned was in August, 1910. I watched it for the Coeur d'Alene Lumber Company about three weeks; was employed for that purpose, when I first commenced to watch the fire it had extended to the sawdust pile and remained on fire for three weeks and longer. It spread pretty much over all the sawdust in places. It reached nearly every part of all the sawdust around the edges of that pool. I threw water on the sawdust. After I quit work there in 1910 the sawdust pile was pretty well blackened and rotten; showed evidence of having been burned pretty badly around the edges and the fire undermined it, some of it showed a condition of decay; it was older than others. (Transcript, pages 105-108). During the time the sawdust pile was on fire boys played there. I forbid them. I told them it was working underneath and undermining it and I drove them away half a dozen times, and they still came back. I did not tell any of their parents; I simply told the boys it was dangerous, and that they oughtn't to be playing there on account of the holes in the sawdust and fire. After I quit watching there in 1910 I did not go to the place very often. (Transcript, pages 108-109).

Adam Howard testified for Defendant in Error substantially as follows: I reside at St. Maries; am farmer and gardener; my place is about two hundred and fifty yards from where the boys were drowned. I lived there from the last of March until the accident occurred. I noticed children, and quite frequently some of them were playing and I had a couple of children herding cows there. My children herded cattle there that season and last year. They started to herd cattle there in May before the boys were drowned. The children were playing over the ground there. There is quite a nice open scope of country there, and they were playing around the sawdust pile and on that open grass plot there. There was hardly a day passed but there was some around. I, of course, was busy a good deal of the time. I probably didn't notice every day. I didn't think anything about the matter; I have been around the place where the boys were drowned before they were drowned and since. There was a little puddle of water, that was all that was noticeable. I lived about three hundred yards from the sawdust pile. My house was in sight of it. I worked at gardening and plowing gardens around town. I was in sight of the sawdust pile, mornings, evenings and noons. My boys herded cattle not on the sawdust pile, but around it; from twenty yards to one hundred and fifty or two hundred yards. My children were twelve years old. I am pretty familiar with the surroundings there. When I first moved there the sawdust pile was burning a good deal of the time. It was somewhat blackened and decayed.



It was not a dumping ground for garbage close into the pool. The pool was in the neighborhood of eight or ten feet wide and about twice that long. I did not try to measure the water to see how deep it was. It wasn't particularly clear. It was pretty muddy. (Transcript, pages 110-117).

Josephine Grace Maynard Scott testified for Defendant in Error substantially as follows: I reside at St. Maries about a block and a half from the sawdust pile where the two boys were drowned; we moved there the first of February previous to the drowning. It was a very common occurrence to see children playing there. They used it as a play ground. It was a commons and children will congregate on a commons. Sawdust attracts many children. They like to put their bare feet in the sawdust and feel it running through their toes. It was a very common occurrence to see children there. Sometimes, perhaps, there wasn't any for some days and again there might have been three or four to a dozen or fifteen. I often noticed them sliding down the sawdust upon our side; have seen them running along the top edge. The sawdust extended quite high, and it is a steep slide toward our place. I know where the hole is that the boys fell into. In playing the children would play right on the top of the sawdust pile and slide down to the bottom. The sawdust pile was quite steep. There was a little ledge that was sloping, but not very wide. I went up there when the boys were drowned. I came to the sawdust pile and Mr. Warner had just got the boys out of the water and there

was not much room for us to get around the bodies to work because of the slant of the sawdust. (Transcript, pages 117-122). I have one child, a girl eight years old. She did not play around that sawdust pile. The place where the sawdust pile and pool are was a commons. I call it a commons because it is not fenced and there is no forbidding anyone on it. There is an open space there above the sawdust. The well looks like a puddle. This pool or well is not between the sawdust pile and my house; it is on the other side or part of the sawdust pile. I saw boys slide down the sawdust pile on the side next to my house. When they were sliding on the other side I could not see them from my house. (Transcript, pages 123-124). I saw that sawdust frequently in 1911. I have passed by there. There had been fire in the sawdust pile from the time we moved there frequently. I think there was a fire broke out there supposedly to have been set by children. We moved there in September, 1910. There was a fire in the sawdust at that time. The sawdust pile had been pretty badly burnt over. There were black spots in it, and I had heard that it was honey-combed where the fire had gone through and into it. I did not know there was a pool there until the children were drowned. When I saw it it looked like a standing puddle of muddy water. I could not see the bottom of it. There was sawdust floating around on top. (Transcript, pages 125-126). These commons extend back to and include the mountains, there is quite an open country. Within a hundred yards of the sawdust pile there

were flowers and such things that would attract children. (Transcript, pages 127-128).

Elizabeth Maynard testified for Defendant in Error, substantially as follows: Mrs. Scott and I lived together at St. Maries. We moved there about the first of February, before the children were drowned in June. I saw the sawdust pile. I couldn't see what the condition was. I saw children playing around on the sawdust pile. We could see it right from our home. It was a common occurrence. They played digging into the sawdust and sliding down. I never paid any attention to how many there were there. I didn't know anything about that pool. I never had seen or heard anything about it. During the time I lived there I saw the sawdust pile on fire. The street runs very near the sawdust, but I had never been on the other side of the sawdust pile. I saw holes in it, and that it was blackened. I don't remember just how it looked; I think it looked just like sawdust. Our door faced the sawdust. I didn't pay much attention to it. I have often seen children playing out on the commons. I had to do my own work and I wasn't watching the children all the time, so I couldn't say they were on the commons the most or the sawdust the most; I didn't have much time to pay attention to other people's children. I had children of my own. (Transcript, pages 128-134).

Frank B. Jones, recalled for Defendant in Error, testified substantially as follows: I watched the fire there in 1910. It caught on fire from the forest fire. It wasn't set there by Schmidt Brothers or

the Coeur d'Alene Lumber Company. It was still on fire in 1911. I think it lasted there all winter, underneath. I know it was a pretty hard fire to put out. I think there was smoke coming out of it in 1911. (Transcript, page 135). There were ashes over the top. There were great holes burnt underneath. The fire worked in under the sawdust. I was afraid it would undermine the pile. I put a great deal of water on it during the time I was guarding it and the water and the fire together blackened the pile up to a certain extent and decayed it to a certain extent. The water in this pool was blackened and sawdust and scum floating on top of it. There was a stream or outlet that went down towards St. Maries under a culvert there from this pool. (Transcript, pages 136-137).

O. J. Thompson, Defendant in Error, recalled, testified substantially as follows: At the time the boys were drowned there was no creek running into this well that I know of. I did not see any there. I never was there before. (Transcript, page 138). I have another child, a girl. (Transcript, page 143).

Witnesses for the Plaintiff in Error testified substantially as follows:

William Schmidt stated: I and my brother had a contract with the Coeur d'Alene Lumber Company in September, 1907. We were operating a sawmill at St. Maries. The instrument marked "Defendant's Exhibit No. 1" for identification is the contract. I and my brother signed it. That is the signature of Mr. Carroll, the manager of the Coeur d'Alene Lum-

ber Company. (The contract was admitted in evidence.) (Transcript, pages 161-168). Under this contract my brother and I built the mill; it belonged to us; no part of it belonged to the Coeur d'Alene Lumber Company; it had no interest in it. Under this contract we sawed out about six million feet. We operated our mill, under this contract, at that place, about a year. We began operating about November 1, 1907. We employed our own men; hired them, discharged them and paid them. The Coeur d'Alene Lumber Company had nothing to do with the payment of their wages. We got the water to operate our mill out of a hole in the bottom or draw running through there; there was a creek and a spring to the creek; there was a spring where we got the water, a perpetual spring; ran the whole year. We dug our hole right in the spring. It was about five feet deep and about four and a half feet wide. The water that filled up the well or hole came from the bottom of the hole or from the spring. The spring was right in the bottom of the hole. The water from those holes bubbling up from the spring was drawn away by a drain put through there. (Transcript, pages 169-171). This drain was a wooden box about forty feet long, extending down the bottom of the little valley. The holes would fill up if we shut the mill down for a day or so and the water overflowed through the drain, and there was then just the water standing in the well or hole up to the surface or top of the well. The wells were curbed. At the bottom the curbing drove in straight



up and down. Around the sides it was laying flat. The curbing was two inch plank. Those planks were just about even with the top of the well; about even with the ground around the well. These holes or wells were covered with two inch planks covered over, and fastened the cover down with nails and spikes fastened onto the curbing, that projected up. Those wells or holes were kept covered by us in this manner during all the time we remained there, and this cover was on these wells when we left those premises in 1910. (Transcript, pages 169-176). The well or hole remained covered when we left there in July, 1910. It was covered at that time; the planks nailed down. Up to the time we left there the drain drew the water from the holes. (Transcript, page 178). At that time there was no water at that point outside of these wells, except what was running through the drain. (Transcript, page 182). I am acquainted with O. J. Thompson, the Plaintiff in this case; I knew him at St. Maries; I have seen him at the place where we were operating our mill. I know he has been there more than once. (Transcript, page 182). A man named Freeman was there working for the Coeur d'Alene Lumber Company, checking the lumber. We operated our mill there about a year; cut all the available timber on that section; all that our contract called for; we nailed those plank over this well right after it was dug; two inch planks, the curbing was composed of two inch planks. The spikes we used to nail down the top planks were fairly heavy. We usually put

in two. I nailed them down myself. I don't recall. I saw it after it was done. In order to get those planks out a crow bar would have to be used to pry them out. They were nailed down good and secure; everything was all covered up. You couldn't see any water around there at all after it was covered up. It remained in that condition all the time. We covered up two wells there. They were about eighteen inches apart. (Transcript, pages 183-184). There was another well above these other two wells, about fifty or sixty feet; I did not cover them up. I had nothing to do with that. We covered up our two wells, to keep stock out of them. I was not in charge of all the premises there. (Transcript, pages 184-185). I dug the two wells right there together. I covered them both in the same way. I did not throw any dirt or anything over them. I dug the first well in November and the next one I think in August. I did not cover them both at the same time. I covered the first one right after I dug it and the next one after I dug it. Thompson was looking there when I saw him, just looking on; that was in the fall of 1907. One of the wells had been dug at this time and was covered up. (Transcript, pages 185-187). Freeman, who represented the Coeur d'Alene Lumber Company, looked after the sawing there, looked after the yard, after the piling; he had nothing to do with operating the mill. When Mr. Hunt was there he had nothing to do with operating our mill or with hiring our hands or paying them. (Transcript, pages 187-189). The

other well, the one I did not dig, was used by the Coeur d'Alene Lumber Company for watering their horses. I don't know about how deep it was. It was in the fall of 1907 we put our mill there. Thompson was there looking on after we got started in November. I couldn't say the exact date. I do not know that he was not in that vicinity until April, 1908. I said he was there in the fall of 1907. (Transcript, pages 189-190).

Edward Schmidt testified for Plaintiff in Error, substantially as follows: I am a member of the firm of William Schmidt and Edward Schmidt. Our firm had a contract with the Coeur d'Alene Lumber Company to saw lumber at St. Maries in 1907. We moved the mill in there about October 1, 1907, it belonged to my brother and myself. The Coeur d'Alene Lumber Company had no interest in the mill. Under our written contract with the Coeur d'Alene Lumber Company we sawed the lumber under their instructions. This contract occupied us about one year. In constructing and operating our mill we dug out a spring to create a reservoir for water supply for our boiler. We carried the water to the boiler in pipes, a steam jet. Those wells or holes were about four by five or four by six; the first one, and between four and five feet deep; they were covered with two inch planks nailed down; there was a curbing in the well, two inch plank at the top and the plank were fastened to that. The covering planks were fastened to the curbing with nails. That fastening remained on the wells, to my knowledge, as long as we were there.

These wells were between two and three feet apart, I should judge, both of them were covered. They were drained from the bottom in through the draw by a wooden box extending from the top of the well down through in under the sawdust. (Transcript, pages 190-193). We removed our boiler and engine the following spring. We were there until January, 1910, and we removed the remainder of our mill from that place in August, 1910. These wells were covered with these planks in the same way. We removed our mill in August, 1910. (Transcript, page 193). The drain was open in the spring of that year, and there was then no accumulation of water outside the wells. I know O. J. Thompson, one of the plaintiffs in this case. I saw him at our mill while we were operating there. I have seen him there once or twice. I don't recall when I saw him. (Transcript, pages 193-194).

On cross-examination, witness testified: I am not working for the Coeur d'Alene Lumber Company. My brother who just testified is not working for this Company. We now own a mill on Little Plummer Creek at the town of Plummer. I do not remember when I saw Thompson at our mill. It was while we were operating there. I have no recollection as to the time. He was there just looking on. I had known him before that time, had met him, seen him around town. He was just standing looking on like lots of others (Transcript, pages 194-195). I had met his brother, and it was in that way I remember this Mr. Thompson. I remember seeing him there

at the mill. (Transcript, page 196). Mr. Thompson was selling newspapers around the city. (Transcript, page 196).

Charles Schmidt testified for Plaintiff in Error, substantially as follows: I am a brother of William and Edgar Schmidt. I was at their mill running the trimmer when they were operating at St. Maries. I went there about the last of October, 1907, and remained there until the job was finished in October, 1908. I remained there after they finished their contract until May 17, 1911. Part of the time I was driving a team of the Coeur d'Alene Lumber Company, delivering lumber around town. During this time I lived about sixty to eighty yards from the edge of this sawdust pile. In May, 1911, the sawdust pile was burned full of holes. It had been burnt down the sides until there was a big high bank there. There were big cracks there in the sawdust pile where the fire had burnt the sawdust from underneath; it left the gap open. The sawdust was all dirty looking color; the fire started from the general forest fires that summer. The sawdust caught on fire, I think, the 23rd day of August, 1910, and continued burning all the next summer. In the early part of the year 1911, I saw fire in the sawdust. Up to the time I left there there was still fire in it; the fire was all underneath; every once in a while you would see it burst out. There was a reservoir surrounded by the sawdust, but there was no pool of water there at the time that I knew of it. There was supposed to be water in the reservoir. I saw what I took to be wells from the covering over them. (Transcript, pages 196-



200). While I was there I saw children around that sawdust pile; I have seen two and three and four at different times; I ordered them off because I knew the condition of the sawdust pile, and the danger they were in. They were in danger of falling down off the bank and also falling in those holes that the fire had burned underneath. I knew Mr. Thompson's little boy. I ordered him away twice. I think it was in the spring of 1911. I know Mr. O. J. Thompson; I saw him around the mill. I don't know how often; I saw him there once that I am positive of sometime in the summer of 1908 (Transcript, pages 200-201). There was a culvert through underneath the sawdust piles to drain any surface water that came down from above. After this fire the water stopped going through the culvert. It just seeped through the sawdust. I do not know exactly the date or month in 1911 that I saw the Thompson boy there. The weather had warmed up. I think it was in the evening along about five or six o'clock. There were two other little children with him, McCallister's little boy and a little girl; I drove them away. I saw the same three children there after that twice. They were running around the sawdust pile and one of them was stepping out and pushing the sawdust down over the edge. I had known the Thompson boy before that. I saw him around town. I knew his father at that time. I did not know his sister. I knew the McCallister boy. I swear that I ordered the three of them off of there, and one of them was the McCallister boy. I know this was after the fire. I left there in May, 1911. The extent of the fire in the sawdust

was of such magnitude that the people in St. Maries could see it and know that it was on fire. They were afraid it would set the town afire. The city policemen helped in an effort to extinguish the fire and part of the Coeur d'Alene Lumber Company's men helped. They used the City's hose and City water. I can't recall the time. (Transcript, pages 201-206).

J. T. Carroll testified for Plaintiff in Error, substantially as follows: I am manager of the Coeur d'Alene Lumber Company; I am acquainted with Schmidt Brothers. I had a contract with them whereby they used their mill for sawing some of our lumber. We, the Company, had a small well about the depth of a boiler some seventy-five feet from where this pile of sawdust was to get water for our horses; the water in this well that we used wasn't over three feet deep; I know nothing about the place where the boys were drowned; didn't know it was there, never knew it was there. (Transcript, pages 206-207). I have been to St. Maries a few times; have never lived or stayed up there, have examined the company's properties up there; had charge of the properties in a certain way. We have a retail lumber yard up there, and we had this contract with Schmidt Brothers to saw out a lot of timber. Mr. Hunt looked after it for us. I am general manager of the Coeur d'Alene Lumber Company. (Transcript, pages 208-209).

O. J. Thompson, Defendant in Error, again recalled, testified substantially as follows: I was never upon these grounds in question. I have talked with Schmidt Brothers since they got done sawing there. I did not know them before. I talked with them sometime before

the accident. I moved to St. Maries April 24, 1908, from Kansas City, Missouri. The McCallister boy came there first, November or December, 1907. I do not know of my boy being up there on the ground at all at any time. The McCallister boy came back there about July, 1911. He left there about September, 1910, and was back about July, 1911. I was never informed either directly or indirectly of the condition of these premises in reference to this well being there, or any other dangerous condition. (Transcript, pages 210-211). I lived about four and a half blocks from the McCalisters in St. Maries. The boy is my sister's boy. I was in St. Maries when he left Kansas City. I do not know exactly what time he left there for St. Maries. He went back to Kansas City in September, a few days after the forest fire in August. He came back the following year to St. Maries, I think in July. I couldn't swear to the month he returned. I swore to my original complaint in this action. I now say that I don't know that my son was ever on this sawdust pile, or at the sawdust pile before the time he was drowned. My boy may have been there, but I didn't know it. I didn't think I swore in my original complaint that my boy habitually used these premises up to the time of his death. (Transcript, pages 212-214).

Mrs. Clara Thompson, recalled, testified for Defendant in Error, substantially as follows: We moved to St. Maries in April, 1908. (Transcript, page 214).

Frank B. Jones, recalled, testified for Defendant in Error, substantially as follows: In the summer of 1910, I worked there for the Coeur d'Alene Lumber

Company, looking after the fire in the sawdust. I did not at that time, or at any time see any planking or curbing for these wells, and there was nothing of that kind there when I stuck the stick down to see how deep it was or to indicate that any had been there; I saw this pool there before the fire in the sawdust. There was nothing there to indicate any covering. There was water there, but I never saw any curbing.

On cross-examination, he said: That he never examined these holes to see whether there was any curbing there or to see if there was any covering on them. Only the one time when that I run that edging down in there; it was after the forest fire; I never made any examination of the premises to ascertain whether there was any culvert or box drain from there; if there was it was always covered over, because there was always water and no cover in sight.

Part of paragraph 2 of the Amended Answer was introduced in evidence. (Transcript, pages 215-217).

The first Assignment of Error (Transcript, page 237) is that the trial court erred in overruling Defendant's demurrer to the original complaint because said complaint shows that Plaintiff knew of the dangerous condition of the well, or sink, or cistern, long prior to the drowning of his minor son therein; said complaint alleging that the dangerous and unsafe condition of said premises was open and notorious prior to the death of said Bernarr Thompson. Plaintiff was clearly guilty of gross contributory negligence in not preventing his said son from going in, about or upon said premises.

"While in matters of jurisdiction, negligence of parents or others in loco parentis cannot be imputed to a child to support the plea of contributory negligence when the action is for his benefit, yet, when the action is by the parent in his own right, or for his benefit, as when he sues as administrator, but is also the beneficial plaintiff, the contributory negligence of the parent may be shown in evidence in bar of the action, and this, although the action is brought by one parent, and the negligence was that of the other "

29 Cyc. 555. Together with footnotes 86, 87, 88.

The case of *Bamberger vs. Citizens St. R. Co.*, 28 L. R. A. 486, upholds the proposition upon the theory that one should not recover damages for an act brought about by his own negligence.

The case of *Tinker vs. Draper*, 86 N. W. 917, also upholds the law.

"Where the rule obtains that negligence of the parent will not be imputed to the child, it matters not in what particular such negligence consists. Where, however, the other rule is adopted, parents are guilty of contributory negligence if they permit a child to go unattended to places which they know to be dangerous." 29 Cyc. 557.

In the case of *Canavan vs. Stuyvesant*, 33 N. Y. Supp. 53, this last rule was upheld.

In the case of *Flynn vs. Hatton*, 43 How. Pr. (N. Y.) 332, the court held that it was negligence on the part of parents to permit a child three years of age to wander on a dilapidated piazza or balcony and that such negligence precluded the child from recovery for injuries received therefrom.



"If a father permits his child to go into a dangerous place on the street, and the child is injured, the father is guilty of such contributory negligence as will bar recovery by the child for the injuries so received."

McLain vs. Van Zandt, 39 N. Y. Super. Ct. 347.

The second Assignment of Error (Transcript, pages 238-239), is that the trial Court erred in overruling Defendant's objection to the admission of any evidence in said cause for the reason that the original complaint did not state facts sufficient to constitute a cause of action. The argument and authorities cited with reference to the first Assignment of Error applies with equal force to this second Assignment.

The Third Assignment of Error, to-wit, "that the trial Court erred in entering judgment for Plaintiff and against Defendant" (Transcript, page 239), will be considered in the argument hereafter made in this Brief.

The fourth Assignment of Error, (Transcript, pages 239-240), that the trial Court erred in permitting Plaintiff, over Defendant's objection, during the trial of the cause to amend his Complaint, by adding to paragraph 7 by interlineation the following "that in addition to said well so located on said land of the Defendant a large amount of sawdust had been accumulated from the lumber mill theretofore located on said land, and said sawdust was strewn and scattered around and upon said land and surrounding said well as aforesaid in large piles, and constituted and was an attractive and inviting place for children of tender years to congregate and play, and children of tender

years did habitually play upon the lands of said defendant, and the well or cistern herein complained of was located adjoining said sawdust pile so that said sawdust pile partially surrounded the same, and by reason of the location of said sawdust pile the lands of defendant attracted children thereto to play thereon and upon said sawdust pile surrounding said well or cistern" for the reason and because said amendment took defendant by surprise, and changed plaintiff's cause of action, and contradicted the complaint as it originally stood without such amendment.

According to the weight of authorities if there is an entire failure to state the cause of action in the original pleading, no amendment, so as to state a cause of action, is permissible.

31 Cyc. 407, supported by cases in footnote 76.

The case of *Ellison v. Ga. R. Co.*, 13 S. E. 809 holds that, unless, as it stands, the complaint sets forth a full and complete cause of action, no amendment is allowable.

The doctrine that the courts have no power to allow an amendment to an existing pleading, introductive of a new and distinct cause of action, was upheld at Common Law, and in a majority of the states the courts have held that their codes confer upon them powers no greater than those existing at Common Law, and that they are not authorized to grant such amendments at any stage of the pleadings. 31 Cyc. 409-410 and cases in footnote 89, among which cases is cited *Hallett vs. Larcon*, 5 Ida. 492, 51 Pac. 108.

The fifth Assignment of Error (Transcript, page

240) is that "the trial Court erred in permitting plaintiff, over the objection of the defendant, during the trial, to amend his complaint by striking out of paragraph 8 of said complaint the following words: 'Was open and notorious up to the time of the death of said Bernarr Thompson,' for the reason that such amendment took defendant by surprise and eliminated from the complaint admissions of plaintiff of contributory negligence."

Assignment No. 5 is covered by the cases cited under Assignment No. 4.

The sixth Assignment of Error (Transcript, pages 240-241) is that: "The trial Court erred in overruling and denying defendant's motion for a non-suit, made herein at the close of the testimony, because the Plaintiff failed to prove a sufficient case for the jury, said motion having been made under the provisions of Section 4354 of the Revised Codes of the State of Idaho, which is as follows:

'Section 4354. An action may be dismissed or a judgment of nonsuit entered in the following cases:

'1. By the plaintiff himself at any time before the trial upon the payment of costs; provided, a counterclaim has not been made or affirmative relief sought by the cross-complaint or answer of defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon;

'2. By either party upon the written consent of either;

'3. By the Court when the plaintiff fails to appear

on the trial, and the defendant appears and asks for a dismissal;

'4. By the Court when, upon the trial and before the final submission of the case, the plaintiff abandons it;

'5. By the Court upon motion of the defendant when, upon the trial, the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register. Judgment may thereupon be entered accordingly.' "

Upon all the evidence, the plaintiff failed to prove a sufficient case for the jury, in the following particulars:

A. The evidence failed to prove that for some or any time prior to June 1st, 1911, defendant owned, operated or maintained a sawmilling or woodworking plant consisting of buildings, machinery, appurtenances or appliances, located or situated upon its lands in the City of St. Maries, Idaho, or as a part of said plant, defendant caused to be excavated or dug a certain cistern or well which was used by defendant for the storage of water to be used in operating said milling plant, or for any other purpose or at all.

B. The evidence wholly fails to show that some months or any time prior to the first day of June, 1911, defendant caused all or any of said buildings, machinery or appliances to be moved off of said lands, or carelessly or negligently failed to fill up or cover up said alleged cistern, well or excavation, or carelessly, negligently or recklessly permitted the same to remain open up to or including the time that said Bernarr Thompson was drowned.

C. The testimony fails to prove and does not prove that on June 1st, 1911, or at any other time, while said Bernarr Thompson, in company with other children, was playing upon said premises close to or in the immediate vicinity or said alleged well or cistern, he accidentally or inadvertently fell into said well or cistern and was drowned, but, on the contrary, the testimony shows that the said Bernarr Thompson, with another boy by the name of Russell C. Moore, did not go to said pool, well or cistern intentionally or by reason of the attractiveness of the sawdust pile near the same, but aimlessly stopped thereat while wandering through the hills and woods, took off their clothes and went in bathing or swimming, and, while doing so, got beyond their depth and were drowned.

D. The evidence is insufficient to show and does not show that either the pool, sink, cistern or well or the sawdust pile, mentioned in the complaint or testified to by the witnesses, attracted the said Bernarr Thompson to the premises where he was drowned, but on the contrary, he, the said Bernarr Thompson, in wandering through the woods and hills with two other boys, passed near said pool and deliberately and of his own volition went in swimming or bathing and was drowned.

E. That the complaint and testimony in this case show that the plaintiff was guilty of contributory negligence in permitting his son to visit and play in and about said sawdust pile, pool, hole, well or cistern.

F. That the testimony wholly fails to prove or show that the alleged sawdust pile, pool, hole, cistern or well was attractive or inviting to children, but, on the con-



trary, said sawdust pile was discolored, blackened and honey-combed with having been on fire, and was uninviting and unattractive.

G. That the testimony wholly fails to show that the alleged attractive or inviting condition of said sawdust pile, pool, hole, cistern, or well was the proximate cause of the death of said Bernarr Thompson.

H. That the testimony fails to show that the said Bernarr Thompson met his death by or through any negligence or carelessness on the part of the defendant.

I. The sworn complaint shows upon the face thereof that if said premises were dangerous, the dangerous and unsafe condition thereof was open and notorious and must necessarily have been known to plaintiff, and that plaintiff was guilty of contributory negligence because he did not prevent the said Bernarr Thompson from visiting the same and because he allowed him to visit or frequent the same." (Transcript, pages 241-243).

The seventh Assignment of Error (Transcript, pages 243-244) is that "the trial Court erred in overruling the motion for a nonsuit renewed by defendant at the close of all of the testimony and upon the same grounds that the original motion for a nonsuit was made, and also in overruling defendant's motion for a directed verdict for defendant upon the same and additional grounds at the close of the whole testimony, because in addition to the grounds and reasons hereinbefore specified, the evidence was insufficient to warrant a recovery by plaintiff of any sum whatever.

That said evidence was insufficient in the following particulars:

A. The testimony shows that the hole, well or cistern in which said Bernarr Thompson was drowned was not dug or made by defendant, but was made by Schmidt Brothers, independent contractors, and that at the time the same were dug, Schmidt Brothers, as independent contractors, had and held a contract with defendant, and were operating, upon the premises where said Bernarr Thompson was drowned, a sawmill plant of their own, and that the defendant had no interest or ownership in the plant and did not participate in the operation thereof, and took no part in digging, making or maintaining said hole, cistern or well, and had no knowledge of the existence thereof.

B. The evidence shows that defendant never did own or operate any kind of sawmill or woodworking plant or any other kind of plant upon the premises where said Bernarr Thompson was drowned, and, upon ceasing to operate their plant upon said premises said Schmidt Brothers removed the same and their buildings therefrom and securely covered said hole, well or cistern, and that the said covering of the same was removed without the knowledge, fault or negligence of the defendant, and by a person or persons unknown."

The eighth Assignment of Error (Transcript, pages 245-247) is that "the evidence is insufficient to warrant or justify a verdict or judgment in any sum whatever for the reasons stated in Assignments VI and VII, and further in the following:

(a) The evidence is insufficient to prove and fails to prove that the sawdust pile or hole, cistern, well or

sink or either of them, was inviting or attractive to children and particularly to said Bernarr Thompson.

(b) The testimony is insufficient to prove and fails to prove that the deceased was attracted to the premises by reason of the sawdust pile or the hole, well or cistern, but, on the contrary, shows that he, with other boys, was rambling through the hills and the woods, and casually and aimlessly came upon said premises and stopped thereat without any preconceived intention or purpose of visiting the same.

(c) The evidence is insufficient to prove and fails to prove that said hole, well or cistern was made or dug by the defendant or that said sawdust pile was left by the defendant, or that the said defendant at any time owned or operated a sawmill plant or other plant upon the premises.

(d) The testimony is insufficient to prove and fails to prove that while visiting or walking in, upon or about the premises, the said Bernarr Thompson accidentally fell in any hole, sink, well or cistern thereon, but, on the contrary, shows that after going upon said premises without any prearranged purpose or intent so to do, he first took off his shoes and stockings, and with the other boys, waded about in the water in said alleged pool, sink, or well, and after wading about in the water awhile, he and another boy, by the name of Moore, took off their clothes and commenced to bathe or swim in said hole, sink or pool, and got beyond his depth and was drowned.

(e) The testimony is insufficient to show and fails to show that said alleged hole, sink, pool, cistern or well

was not properly or securely closed up at the time that Schmidt Brothers abandoned the premises and moved therefrom their plant and other property, but, on the contrary, shows that upon abandoning the premises said Schmidt Brothers securely covered over and fastened a top upon said sink, pool, hole, cistern or well and that thereafter and unknown to said Schmidt Bros., some persons uncovered the same, without any fault of Schmidt Brothers, and unknown to the defendant and without any negligence whatever on the part of the defendant.

(f) The testimony is insufficient to show and fails to show that the attractive or inviting condition of the sawdust pile, hole, sink, pool, well or cistern, mentioned in the complaint herein, was the proximate cause of the death of said Bernarr Thompson.

(g) The testimony shows that plaintiff was guilty of such contributory negligence in permitting the said Bernarr Thompson to visit and frequent said premises as should and ought to preclude him from recovering in this action.

(h) The testimony is insufficient to show and fails to show that the defendant participated in the operation of said sawmill plant or had any interest therein, or that it dug or participated in the digging of the said hole, sink, well, pool, or cistern, or maintained the same, or that it left the sawdust pile upon said premises, but, on the contrary, shows that said Schmidt Brothers held said premises under a contract from defendant; were operating said sawmilling and woodworking plant as independent contractors, dug and made said hole,

sink, pool, cistern or well, leaving upon said premises said sawdust pile, and before vacating the premises, securely covered said hole, sink, pool, cistern or well.

(i) The testimony is insufficient to show and does not show or prove any carelessness or negligence on the part of the defendant whatever."

Separate and apart from the contributory negligence of the Defendant in Error in allowing his minor son to frequent the place where he was drowned, the main point is that the locality and the place where Defendant in Error's minor son was drowned was not of such character as to render it attractive to children of tender years, and to induce them to frequent the locality at or near the pool, hole, or cistern, where Defendant in Error's minor son was drowned.

The "attractive nuisance" theory upon which this action was finally disposed of, after the amendments to the complaint were allowed, is based upon the ground that the nuisance is attractive to young children, and that a land owner who permits such an attractive nuisance to remain upon his premises is liable for any injury which may be caused to children by coming in contact with such nuisance. The familiar illustration is that of the railroad turntable. It is well settled, however, that the doctrine of the "Turntable Cases" will not be extended:

*Curtis vs. Quarry Co.* 79 Pac. 955 (Wash.)

*Harris vs. Cowles*, 80 Pac. 537 (Wash.)

In *Curtis vs. Quarry Company*, *Supra*, the Defendant maintained a quarry power house on its premises, and there was nothing about the premises, or machin-



ery, alluring or attractive to children, or tending to invite them thither. A child six years of age went into the power house of his own volition. The engineer in charge drove him and his older brother from the engine room, whereupon they went to the power room, where two boys in defendant's employ were operating levers, by which rock was raised from a quarry. These minor employes requested Plaintiff's brother to remain and blow the whistle at the close of the work. The Court held that the Plaintiff and his brother were not licensees on the premises, but were trespassers, and that the Plaintiff, who was injured by slipping his foot through an opening in a platform, whereupon it was caught and injured in cog wheels thereunder, could not recover.

The court held that it would not extend the rule laid down in the turn table cases though as one of general applicability to other conditions, and uses this language:

"The respondent in the case at bar had placed upon its premises no dangerous machinery or device, that was in its nature and at once particularly attractive to children. To hold, as a general and universal rule of law, that the owners of mills and factories must so construct and maintain their premises as to be reasonably safe for trespassers, infants or adults, regardless of how they may gain admission, would be destructive of all industry and all property rights. We are satisfied, therefore, that the respondent violated no duty it owed to the appellant as a trespasser on its premises."

In the case at bar, the minor son of the Defendant in Error was not on the premises of the Plaintiff in Error

by invitation, express or implied. He went there of his own volition. He was not attracted to the place by reason of the sawdust or by reason of the well or cistern. He with other boys had been roaming in the hills, and, about the lunch hour, came to this point and ate their lunch, and thereafter began wading in the water, and finally took off their clothes and went in swimming, as boys naturally do in the warm season when they can find water of sufficient quantity and depth.

*Railway vs. Dobbins*, 40 S. W. 863 (Tex.)

In *Delaware, Lackawanna and Western Railroad Company vs. Reich*, 61 N. J. Law, 635, the Court held that "a land owner is under no obligation to a mere licensee or trespasser, even though a child of tender years, to keep his premises in a safe condition; and such child, upon entering, assumes all risk of danger incident to the condition of the premises."

The following cases declare that no distinction exists between adults and infants when entering uninvited upon lands of another with relation to the duty which the owner or occupier of such lands owes to them. .

*Frost vs. Eastern R. R. Co.*, 64 N. H. 220.

*Daniels vs. New York, etc. R. R. Co.*, 154 Mass. 349.

*Walsh vs. Fitchburg R. R. Co.*, 145 N. Y. 301.

*Turess vs. N. Y., etc. R. R. Co.*, 61 N. J. L. 314.

In the case of *Wheeling & Lake Erie Railroad Company vs. Harvey*, 77 Ohio State, 235, the Court held that "a land owner or occupier of land is under no obligation to use care to protect a trespasser while on the premises, and is liable to him only for injury in

tentionally or wantonly inflicted. An owner or occupier of land is under no obligation to exercise care to make his premises safe for, or warn of danger, children who come upon them without license or invitation. A water company is not liable for the death of an infant who comes upon its premises without license or invitation, and, without the knowledge of the company, falls into its reservoir and is drowned."

In the following cases where the injuries were not sustained at a turntable, the doctrine of the "Turntable Cases" is denied:

New Jersey: *Friedman vs. Snare & Triest Co.* 71 N. J. L. 605.

Michigan: *Ryan vs. Towar*, 128 Mich. 463.

Rhode Island: *Paolino vs. McKendall*, 24 R. I. 432.

West Virginia: *Ritz vs. City of Wheeling*, 45 W. Va. 262. *Uthermohler vs. Bogg's Run Co.* 50 W. Va. 457.

In the following cases in which children were injured, but not while playing with a turntable, liability is denied in Courts that have adopted the turntable doctrine, in cases where the injuries were received at a turntable:

Minnesota:

*Emerson vs. Peteler*, 35 Minn. 481.

*Twist vs. Winona etc. R. R. Co.* 39 Minn. 164.

*Haesley vs. Winona etc. R. R. Co.* 46 Minn. 233.

*Dehanitz vs. City St. Paul*, 73 Minn. 385.

*Ratte vs. Dawson*, 50 Minn. 450.

*Stendal vs. Boyd*, 67 Minn. 279; 73 Minn. 53.

*Erickson vs. G. N. Ry. Co.* 82 Minn. 60.

## Georgia:

Savannah, F. & W. R. Co. vs. Beavers, 113 Ga. 398.

O'Connor vs. Brucker, 117 Ga. 451.

## Nebraska:

Richards vs. Connell, 45 Neb. 467.

City Omaha vs. Bowman, 52 Neb. 293.

## Missouri:

Overholt vs. Vieths, 93 Mo. 422.

Barney vs. Hannibal etc. R. R. Co., 126 Mo. 372.

Witte vs. Stifel, 126 Mo. 295.

Arnold vs. City of St. Louis, 152 Mo. 173.

## Kansas:

Chicago R. R. Co. vs. Bockovern, 53 Kan. 279.

## Texas:

Dobbins vs. Missouri K. & T. Ry. Co., 91 Tex. 60.

## Tennessee:

Foster-Herbert C. Stone Co. vs. Pugh 115 Tenn. 688.

## Washington:

Clark vs. Northern Pac. Ry. Co. 29 Wash. 139.

Curtis vs. Tenino Stone Quarries, 37 Wash. 355.

Harris vs. Cowles, 38 Wash. 331.

Citing from *Wheeling, etc., R. R. Co. vs. Harvey*, *Supra*, the Court says: "In the case of *Ryan vs. Towar*, 128 Mich. 463, the defendant owned a small pump house located upon ground owned by a railroad company. In the house was a small, overshot water-wheel. The plaintiff, a girl about twelve or thirteen years of age, was in the habit of passing this pumphouse on the way to school with her brothers and sisters, going across lots through the field, because it was nearer. For some time previous to the time of

the accident, a hole existed in the stone wall of the house inclosing the wheel, through which children went to play on the wheel. On the day in question, the brothers of plaintiff, on the way from school, crawled through this hole, and, mounting the wheel, were able by their weight to turn the wheel part way around and back. A younger sister, aged eight years, got caught between the wheel and the wheel pit. The plaintiff heard her screams, and went through the hole to her succor, and aided in rescuing her, and was herself injured. In the opinion, Hooker J., after reviewing a number of turntable cases says: 'Here we have the doctrine of the turntable cases carried to its natural and logical result. We have only to add that every man who leaves a wheelbarrow, or a lawn mower or a spade upon his lawn; a rake with its sharp teeth pointing upward, upon the ground or leaning against a fence; a bed of mortar prepared for use in his new house; a wagon in his barn yard, upon which children may climb, and from which they may fall; or who turns in his lot a kicking horse or a cow with calf—does so at the risk of having the question of his negligence left to a sympathetic jury. How far does the rule go? Must his barn door, and the usual apertures through which the accumulations of the stables are thrown, be kept locked and fastened, lest twelve-year-old boys get in and be hurt by the animals, or by climbing into the haymow and falling from beams? May a man keep a ladder, or a grindstone, or a scythe, or a plow, or a reaper, without danger of being called upon to reward trespassing children, whose parents



owe and may be presumed to perform the duty of restraint? Does the new rule go still further, and make it necessary for a man to fence his gravel pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fish pond, and must he guard ravines and precipices upon his land?" "

Further on the point that the doctrine of the "Turntable Cases" will not be extended, see:

Marcheck vs. Klute, 113 S. W. 654.

Smalley vs. Rio Grande Ry. 98 Pac. 311 (Utah).

As to ponds or reservoirs, the weight of authority is that they are not to be classed with "turntables," and that the owner of premises on which a pond or reservoir is situated is under no obligation to keep the premises guarded against the trespasses of children.

29 Cyc., 464, citing cases from California, Illinois, Minnesota, Missouri, Nebraska, Pennsylvania, Texas, Wisconsin, and the Federal case of McCabe vs. American Woolen Co. 124 Fed. 283, s. c. 65 C. C. A. 59.

The sawdust and the well, cistern, hole or pond, in the case at bar was not near any traveled street, or highway, or frequented path or trail.

In order to render the land owner liable for injuries occasioned by a pond or excavation, the pond or excavation, must substantially join the highway so that one making a false step, or affected by sudden giddiness, might be thrown within the pond and excavation.

Clark vs. Richmond, 5 S. E. 371 (Va.)

Where a child six years of age walked on a wall along the street and fell into a pit, the land owner was absolved from liability.

In the case of *Talty vs. City*, 60 N. W. 519 (Iowa), a child was injured while digging sand, by a bank caving in upon him, and there was no liability.

In *Clark vs. Manchester*, 62 N. H. 577, a child four years old was drowned in a reservoir that had once been used by the city, but had been abandoned, the fence had been removed, though a portion of the reservoir yet had water in it, and there was a field near by where ball playing and other games were indulged in by children, and children were accustomed to play there. The child while passing along a path at the reservoir fell into it, and was drowned, and there was no liability.

In the case of *Grindley vs. McKechnie*, 40 N. E. 764 (Mass.) where a child went through an opening in a fence along a path and fell into a sewer owned by the City there was no liability.

In the case of *Ratte vs. Dawson*, 52 N. W. 965, a child of three years, playing in a pit, in an unguarded vacant lot, was killed by caving of a bank. In this case children were attracted by the bank, and were accustomed to play there, but there was no liability.

In *Habina vs. Twin City Electric Co.* 113 N. W. 586, a little girl, nine years of age, while crossing the uninclosed lands of the defendant fell into a ditch filled with hot water, and there was no liability.

In the case of *Moran vs. Pullman Palace Car Co.*, 36 S. W. 659 (Mo.), the Court held that "a city property

owner, on whose lot surface water had collected so as to form a pond in an excavation, is not liable, by reason of his failure to protect the pond by fences, for the death of a child while bathing in the pond without permission or invitation from the lot owner."

In the report of this case is a plat or diagram of the pond and surrounding streets, which shows that the pond was surrounded on all sides by streets, on the north by Bernard Street, on the south by Scott Avenue, on the east by Montrose Avenue, on the west by Cardinal Avenue, and showing also a path extending from Bernard Street to Cardinal Avenue, running immediately along the side and end of the pond. The pond was from three feet deep to fifteen feet deep, and, it appears from the decision, that for a number of years, boys in the vicinity and neighborhood of the pond had been accustomed at all hours during the day to bathe in it. The parents of the boy who was drowned lived about a mile from the pond and allowed him full liberty to play with other boys on the streets. The gravamen of the action was that the pond was attractive to children who were accustomed to bathe therein; that it was a dangerous place by reason of the deep hole therein; that Defendant knew or might have known of the danger of the place to children, and that they were in the habit of bathing in the pond; that defendant negligently permitted the pond to be frequented by children; to remain unguarded and unfenced, neglected to fill said excavation, and to fence the same as required by City Ordinance, but the Court held that there was no liability.

This case approves the case of *Overholt vs. Veiths*, 6 S. W. 74 (Mo.), in which a boy eight years of age was drowned in a pond on a lot in the City of St. Louis, and the Court held that there was no liability.

See also: *Charlebois vs. Railroad Co.* 91 Mich. 59.

*Murphy vs. City of Brooklyn*, 118 N. Y. 575.

*Sterger vs. Van Sicklen*, 132 N. Y. 499.

*Greene vs. Linton* 27 N. Y. Supp. 892.

*O'Connor vs. Railroad Co.*, 44 La. Ann. 339.

*Benson vs. Traction Co.*, 26 Atl. 973 (Md.)

*Mergenthaler vs. Kirby*, 28 Atl. 1065 (Md.)

*McGuiness vs. Butler* 34 N. E. 259 (Mass.)

The case of *Overholt vs. Veith*, *supra*, has been recently approved in the case of *Witte vs. Stifel*, 126 Mo. 295, *Barney vs. Railroad*, 126 Mo. 372.

In the case of *Peters vs. Bowman*, 47 Pac. 113 (Cal.), where a boy eleven years of age was drowned in a pond on a city lot, there was no liability, the Court saying:

"One who allows surface water to accumulate in a pond on his land, without fencing or inclosing the same, is not liable for the death of a trespassing infant who was drowned therein."

On rehearing, 47 Pac. 598, the Court, speaking through Chief Justice Beatty, uses the following language:

"A turntable is not only a danger specially created by the act of the owner, but it is a danger of a different kind to those which exist in the order of nature. A pond, although artificially created, is in nowise different from those natural ponds and streams, which ex-

ist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and, therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds are always useful, and often necessary, and where they do not exist naturally must be created, in order to store water for stock and domestic purposes, irrigation, etc. Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child, who, attracted by the fruit, climbs into the branches, and falls out. But this, we imagine, is an absurdity for which no one would contend, and it proves that the rule of the "Turntable Cases" does not rest upon a principle so broad, and of such rigid application as Counsel supposes. \* \* \* \* In the Illinois case, *City of Pekin vs. McMahon*, 154 Ill. 141, cited by Counsel, the City of Pekin was held to have been culpable in excavating a deep pit within the city limits, which afterwards filled up with water."

In the case of *Richards vs. Connell*, 63 N. W. 915 (Neb.) liability was denied for the drowning of an



infant child in a pond on land in the vicinity of a public school, the Court saying:

"The owner of a vacant lot, upon which is situated a pond of water or dangerous excavation, is not required to fence it, or otherwise insure the safety of strangers, old or young, who may resort to said premises, not by invitation, express or implied, but for the purpose of amusement, or from motives of curiosity."

In this case "the plaintiff's intestate, a boy of ten years of age, who was accustomed to play in and about a pond of water on a vacant lot, the property of defendants, fell from a section of wooden sidewalk, which he was using as a raft on said pond, and was drowned." The Court held, "that the defendants are not liable for damage, and their demurrer to the petition or complaint was properly sustained."

The Court cited, among other authorities, the following:

Klix vs. Nieman, 68 Wis. 271.

Gillespie vs. McGowan, 100 Pa. St. 144.

Pierce vs. Whitcomb, 48 Vt. 127.

McEachern vs. Railroad Company, 150 Mass. 515.

Gay vs. Railway Co., 159 Mass. 238.

Beck vs. Carter, 68 N. Y. 283.

Cooley on Torts, 606.

Shearman & Redfield on Negligence, Sec. 505.

In the case of Hargreaves vs. Deacon, 25 Mich. 1, where a child fell into an uncovered cistern and was drowned, liability was denied, the Court, speaking through Justice Campbell, concurred in by Chief Jus-

tice Christianity and Justice Cooley, in an elaborate opinion, citing many cases, among other things, says:

"Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which hold that an accident from negligence, on private premises, can be made the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as a place of business, or of general resort held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant.

"We express no opinion concerning cases where the nature of the business is such as to present peculiar attraction to children beyond other kinds of occupation. A person incurs no duties towards persons by not warning or driving them from his premises, and they go there, if mere volunteers, and without invitation, at their own risk. Counsel cited many authorities on the argument, which were in point. It will suffice to refer to a few of the decisions bearing most directly on such a case as the present."

In the case of *Gillespie vs. McGowan*, 45 Am. Rep. 365 (Pa.) liability was denied in a case where a child eight years of age fell into an abandoned and unguarded cistern or well, the Court saying:

"Defendant owned an abandoned and uninclosed brickyard, with an open and unguarded but plainly visible well in it, about eighty feet from the nearest highway. The public were accustomed to cross the yard, but the paths were somewhat distant from the well. The nearest dwelling house was three hundred yards distant. The lot was a common place of resort for children and adults. A boy eight years old was found drowned in the well, having evidently been fishing in it by daylight. Held that no action would lie."

The Court further said: "The well-established principle in such cases is that 'where an excavation is made adjoining a public way so that a person walking on it might, by making a false step, or being affected with sudden giddiness, fall into it, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to be different.'"

Gramlich vs. Wurst, 5 Norris, 74; s. c. 27 Am. Rep. 684.

Hardcastle vs. South Yorkshire Ry. Co., 5 Hurl & N. 67.

Hounsell vs. Smyth, 7 C. B. (N. S.) 731.

Knight vs. Abert, 6 Barr. 472.

Phila. & Reading Railroad vs. Hummell, 8 Wright 378.

Gillis vs. Penn. R. Co. 9 P. F. S. 129.

Cauley vs. Railroad Co., 95 Penn. St. 398.

Duff vs. Alleghany Valley R. Co. 9 W. N. C. 504.

The Court, in the case of Gillespie vs. McGowan, further says: "It is settled by abundant authority that to enable a trespasser to recover for an injury he must do more than to show negligence. It must appear there was a wanton or intentional injury inflicted upon him by the the owner."

See Gillis vs. Railroad Company, Supra, where the subject is fully discussed.

Swartz vs. Akron Water Works Co., 122 Am. St. Rep. 522 (Ohio).

See also Vol. 3 Am. Dig. (Negligence) Sec. 39.

Reidel vs. Railroad, 177 Fed. Rep. 374, is an elaborate case. In that case the children came to the right of way, on each side of which was a fence, and a gate opening through the fence. They saw some flowers on the opposite side and opened the gate, and in attempting to cross the tracks, one of them was injured by reason of being shocked by the third rail. The following is an extract from Judge Gray's opinion:

"There is nothing in the record to bring this case within the *ratio decidendi* of the so-called 'turn-table' cases, and other cases decided on the same principle, to which the plaintiff refers. In the present case, the railroad property was guarded by a statutory fence, and the gate through which the plaintiff and his companion entered upon the railroad premises was fastened with a bolt, which had been withdrawn by them. There is no evidence that there was anything to allure or entice children to go upon the railroad premises at the place where the accident occurred, and none that children had ever been in the habit of entering upon

the railroad premises through this gate, or otherwise, for play or amusement, or for any other purposes. The motive of the children in attempting to cross the railroad, as testified by the children themselves, was to gather flowers growing on the other side of the railroad property. The present case, therefore, differs obviously from the cases referred to, the decisions in them being founded upon the maintenance of a dangerous appliance or object on the owner's premises which presented enticement and allurements to children and to which they were in the habit of resorting, to the knowledge of the defendant. There was thus an implied invitation or license to the children to enter upon the premises, by reason of which they were divested of the character of trespassers, and there was imposed upon the defendants the duty of exercising reasonable care for their protection. *Railroad Company v. Stout*, 17 Wall 657, 21 L. Ed. 745; *Snare & Triest Co. vs. Friedman*, 169 Fed. 1, 94 C. C. A. 369; *Cooke vs. Midland Great West. Ry. of Ireland*, L. R. App. Cas. 1909, Pt. 2, 229.

However deplorable these cases may be, we cannot, in order to remedy them, disregard those well settled principles which have heretofore regulated and limited the restraint imposed upon landowners in the use of their own premises. If the comparatively recent use of the third rail has developed dangers to the public at large hitherto unknown, the Legislature of the State may feel called upon to exercise its undoubted police power, by imposing upon the users of these instrumentalities such precautions in their use as



will measurably afford protection to those coming within their danger. The judgment below is affirmed."

See also *McCabe vs. American Woolen Co.*, 124 Fed. 283, s. c. 65 C. C. A. 59.

In the case of *Fox vs. Warner-Quinlan Asphalt Co.*, decided by the New York Court of Appeals, in January, 1912, and reported in 204 N. Y. 240; s. c. 97 N. E. Rep. 497, and also in American Annotated Cases 1913, C. 745. The Court of Appeals, reversing the N. Y. App. Div., held as follows:

"Where a corporation owning land neither dedicated a path thereon to the public use nor extended any invitation for its use by the public, any liability to a person injured while using it to walk from one street to another is that of a landowner to a bare licensee.

"An owner or occupier of land not chargeable with affirmative negligence is liable only for intentional or wanton injury to a licensee.

"Where a person injured while crossing a tract of land by falling into an excavation is a mere licensee, and on a dark night, with knowledge that there is an excavation close to the path, takes no precaution against falling into it, there is no ground for a recovery from the landowner for injuries thereby sustained."

The Court, in its opinion, says:

"There was no evidence of any invitation to the public to travel over the diagonal route across the defendant's land, which they used for convenience as a short cut from one street to another. It had

never been dedicated to the public use or worked by the highway authorities. All that can be said in plaintiff's behalf on this branch of the case is that the defendant did not forbid or in any manner interfere with public travel over it. Under these circumstances the plaintiff went upon the defendant's land as a bare licensee at best; and the measure of the defendant's obligations to him was that of a landowner to such a licensee.

"The extent of this obligation was accurately stated and fully considered by Judge Gray in *Cusick v. Adams* (115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772. See cases therein cited.) 'The principle is now well settled by repeated adjudications, in this country and in England, that where a person goes upon the premises of another without invitation, but, simply as a bare licensee, and the owner of the property, passively, acquiesces in his coming, if any injury is sustained by reason of a mere defect in the premises, the owner is not liable for negligence; for such person has taken all the risk upon himself.'"

In the case at bar, the minor son of Defendant in Error was not even a bare licensee, he had been, on more than one occasion, ordered away from the sawdust pile.

In *Bottum Administrator vs. Hawks*, 84 Vt. 370; s. c. 79 Atl. 858, the Court held:

"An owner owes no duty to trespassers or licensees whether they be adults or children to keep premises in proper condition. We feel safe in asserting, that in the absence of the elements of 'attractive' dangers

and knowledge, actual or implied, of the presence of the child, the tender years of a technical trespasser, or licensee, will not raise a legal duty on the part of the land owner, where none otherwise exists."

Briefly reviewing the facts, it appears from the evidence that the boy drowned was about eight years of age; that his father, the Defendant in Error, knew or must have known of the existence of the sawdust pile and of the spring or stream that fed the pool or pond, and that a quantity of sawdust situated as it was, would from the very nature of things, clog and dam this spring or stream, and thereby create a pool or pond or hole of water deeper than the water leading to or surrounding it; that Defendant in Error must have known that the sawdust was on fire, burning slowly but constantly, and that this slow-burning fire, eating persistently through the sawdust, would undermine and cause it to become full of holes or small caves, thereby becoming more or less dangerous. (Transcript, pages 108-125-132-136-198).

That this fire assumed such proportions that the inhabitants of the City of St. Maries became alarmed lest the fire reach and destroy the city, and the employes of the Plaintiff in Error, working in conjunction with the Police and Fire Department of the City, using the City fire equipment, attempted to extinguish the fire. (Transcript, pages 205-206).

The Defendant in Error must have known that the children played there, attracted, we contend, by the commons as a play ground rather than by the

accumulated sawdust. (Transcript, pages 112, 120, 123, 128, 134).

The children did not play back of the sawdust pile, that is, between the sawdust pile and the mountains, but on the sawdust pile nearest the City. (Transcript, page 127). The pool of water was on the side of the sawdust nearest to the mountains, and not on the side next to the City (Transcript, page 127), and there is no proof that up to the day of the accident children were seen on the side of the sawdust next to the mountains.

If said premises were dangerous, then Defendant in Error must have had knowledge of such danger, for, in his verified original Complaint, he alleges: "that the dangerous condition of said premises and the danger of small children falling in the said well, or cistern, and becoming drowned, and the habitual use of said premises by said Bernarr Thompson and other companions and children of tender years was open and notorious up to the time of the death of said Bernarr Thompson, and was well known to said defendant, but on account of the tender years of said Bernarr Thompson he did not know or appreciate the dangerous conditions of said premises." (Transcript, page 4).

If the dangerous condition of the premises and the habitual use thereof by Bernarr Thompson was open and notorious and well known to Plaintiff in Error, then these facts were equally well known to the Defendant in Error, and it was his duty to protect his young boy from habitually frequenting premises so dangerous.

As alleged by the Amended Complaint, sworn to by the Defendant in Error, its dangerous character must have been known to the Defendant in Error, and it was his duty as the father of a young boy to know what sort of a place his son, of tender years, was accustomed to daily frequent, and to exercise such parental care and protection as would shield the boy from known danger. That the sawdust was not a nuisance *per se* is plain. It was created and deposited there as one of the results of legitimate business; it was not located in the City limits; it was not near any travelled highway, street or alley; it obstructed nobody's view; it did not pollute the air; it was located on the unoccupied lands of the Plaintiff in Error; it was comparatively remote from any human habitation and it was in nobody's way. (Transcript, pages 56, 80).

It was not a thing of beauty; blackened by fire, discolored by rain and snow, wind and sun, decomposed by time and these several agencies, it was a thing to repel, rather than attract. (Transcript, pages 108, 198).

In itself, it was not dangerous to touch or handle, as is a piece of machinery. The pond of water, in itself, was no more dangerous than any pool, pond, spring or hole, natural or artificial, to be found in streams or bodies of water all over the country. It was not attractive, on the contrary, it was muddy, covered more or less with scum, surrounded, not by green grass or bright-hued flowers, nor shaded by trees of verdant foliage, but surrounded by this black,



discolored, decaying sawdust. (Transcript, pages 59, 108, 117, 136).

The accumulated sawdust, if a nuisance, was not an attractive nuisance; the pond or pool of water, if a nuisance, was not an attractive nuisance. (Transcript, pages 59, 108, 117, 126, 136).

Suppose, instead of sawdust, the whole premises had been a verdant plain in which green trees and bright flowers grew and song birds made music, and in the midst a deep spring bubbled or a crystal pool smiled in the sunlight and temptingly inviting boys to yield to nature's instinct and to bathe and play and attempt to swim therein; would the owner of the premises be compelled to fence, or cover, or destroy such spring or pool by filling it with dirt or stone, to prevent children from falling in and drowning? If so, there could be no protection to any property holder. The boys were not attracted by the sawdust the day the accident happened. They went to the hills to play "cowboy" and "lumberjack," and after wandering around for some hours, came to the water and waded in and then went in swimming. (Transcript, pages 85, 86).

They would have done the same thing had it been a natural pool or pond in this or any stream or an artificial pond, wherever situated. The pool, according to positive evidence, attempted to be contradicted by merely negative testimony, was curbed with solid two inch upright planking, and the top or surface was covered with like plank, nailed down with spikes and securely fastened to the curbing, and so remained

covered up to the month of May before the accident happened in the following June. (Transcript, pages 184, 192, 199).

The Defendant in Error was guilty of contributory negligence. The Plaintiff in Error was not guilty of any negligence. On the contrary, it appears from the evidence, without contradiction, that the Thompson boy and other children had been driven away from the sawdust, not from the water, on at least two different occasions, by the employes of the Plaintiff in Error (Transcript, pages 108, 200, 204), and these employes ordered the boy away, not because they were playing at or near the pool of water, but because they were playing in the sawdust, which was then on fire and which was full of holes and small caves and undermined in such way that it was liable to fall and bury children beneath it.

As has been suggested by more than one court, it is impossible to fence pools or ponds against boys. The only thing that could be done would be to securely cover the ponds or pools or fill them entirely, and no property owner is required to do this, unless, perhaps, the pond or pool is situated so near to a travelled highway, street or alley, that any person passing along would be seized with giddiness, or by making a false step would be thrown into the water.

The evidence in this case shows that the nearest street or highway was about 300 feet distant from the pool of water. (Transcript, pages 56 -- -- ).

That the nearest inhabited house was about one hundred yards distant. (Transcript, page 80). And

there was no public travelled street, highway, alley or path anywhere near this pool.

Plaintiff in Error respectfully submits that the evidence clearly shows not only that Defendant in Error was guilty of contributory negligence, but there is no evidence supporting the charge that Plaintiff in Error owed any duty to the minor son of Defendant in Error, or to any other persons who might go upon said lands and premises, and there is no proof that Defendant in Error was guilty of negligence, or that the death of said minor child was caused by the negligence of the Plaintiff in Error, and Defendant in Error is not entitled to recover.

Respectfully submitted,  
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IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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COEUR D'ALENE LUMBER COM-  
PANY, a Corporation,

Plaintiff in Error,  
vs.

O. J. THOMPSON,

Defendant in Error.

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BRIEF OF DEFENDANT IN ERROR.

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The statement of the case as contained in the brief of plaintiff in error, while somewhat extensive, discloses a situation extremely favorable to the contention of plaintiff in error, but is so lacking in fairness that we are constrained to invite your honors' attention to the true state of facts as revealed by an impartial recital of the condition actually existing, to the end that your honors may enter upon a consideration of this case with a correct understanding of the issues.

## STATEMENT OF CASE.

From the years 1907 up to the time of the trial of this cause the defendant corporation owned certain lands adjoining the city of St. Maries, in the state of Idaho. These lands were situated in such position and in such close proximity to the city that they were used during all of these years as a sort of play ground or common where children were in the habit of congregating in the pursuit of childish amusements. Some time about the year 1908 the defendant secured the services of Schmidt Brothers in cutting into lumber numerous logs owned by the company in the vicinity of said lands, and for that purpose Schmidt Brothers constructed a sawmill upon its lands in close proximity to the city limits, and sawed lumber for some months, and when the work was completed they moved the mill away, leaving the sawdust piles and a certain well which had been dug during the time that Schmidt Brothers were erecting the mill. The well was dug about eight or ten feet deep in close proximity to the sawmill and was filled with water, which was used for operating the milling plant. The particular individuals who dug the well did so at the instance of Schmidt Brothers as part of their duties in doing what they agreed to do for defendant in cutting the lumber. The defendant company, however, at the time the well was dug and for some time thereafter, was represented by its superintendent, Jas. C. Hunt, who knew that the well was dug and knew the purpose for which it was dug, and after the mill was moved away

the well was never covered up, but was left open,  
filled with water and situated in a low depression or sort of basin in the earth. After the well would become filled with water, surplus water would accumulate in the basin to such an extent that the level of the well proper would spread and widen out a distance of probably eight or ten feet in diameter. Sawdust was allowed to settle down around said pool of water and well and in and around the edges thereof until the same was made to appear as if it were a small pool of water only a few inches deep, and the water being of a muddy and murky character, the depth could not be readily ascertained, and for the further reason that the sawdust was floating and had settled around the edges and on top of the water. After the mill had been moved away, to-wit: about October, 1908, the premises and sawdust piles were permitted to be used by the defendant as a common play ground for children, it being about the only place of that kind in the vicinity of the city, and a great many children were continuously playing in and about the sawdust piles and the premises, which were wholly unfenced and open to the public. This condition was allowed to exist from October, 1908, up to and including the time of the trial of this case, and was in such condition at the time of the drowning of plaintiff's son, Bernarr Thompson. It was customary, among other things, for boys and children to slide down the sawdust piles, burrow in and make holes in the sawdust piles and play all kinds of games and sports which are usually played by children in

and about attractive places such as is a sawdust pile. The well or pool was in close proximity to the pile of sawdust, and the sawdust pile and its surroundings, including the pool of water where children like to wade and play about, were especially attractive to children, all of which was known to defendant and could have been known in the exercise of reasonable care. None of the children who played around and upon the sawdust pile and premises, nor any of their parents knew anything about the well having been dug or left in its open and dangerous condition, excepting one of the agents and servants of the defendant, Frank B. Jones, who testified that he was placed in charge of the premises for the purpose of watching the fire that was going on during the year 1910. He used the well from which to get water to use in putting out the fire. (Record, p. 104). Schmidt Brothers knew of said condition of said well and Mr. Hunt, the company's superintendent, also knew of it, and there was nothing to indicate by appearances that there was any well there at all, but simply a shallow pool of water. On the day of the drowning of Bernarr Thompson, to-wit, June 1st, 1911, he and some other boys were playing around and upon the sawdust pile and had taken off their clothes for the purpose of wading around in and bathing in said pool of water, as it appeared to be; neither one of the boys could swim and Bernarr Thompson went into the water, and after he had gone a short distance he appeared to be drowning, when a boy by the name of Moore tried to help the Thompson boy

out; he was also drowned in the attempt. (See testimony of Kenneth Warner, Record, p. 84).

The complaint was permitted by the Court to be amended at the trial so as to conform to the facts embraced in the foregoing statement of the case, and while a number of assignments of error are embraced in the brief of counsel for defendant, the only one that seems to be relied upon is the claim of no liability, or, which is, in effect, a demurrer to the evidence. Therefore, in considering this question the Court must take the most favorable view of the evidence in all of its aspects and all reasonable inferences to be drawn therefrom which will tend to sustain the verdict and judgment rendered. The question, then, reduced to a simple form, is, whether or not a man can set a trap on his lands, for only by using such language can the dangerous condition be characterized, adjoining a thickly populated city, and by leaving the same open and attractive, invite by implication the school children of a community to congregate and play thereon and thereabout, for three years, and when one of said children shall, by the influence of his childish instincts, approach and go upon the most attractive thing which he can see on which to play, he suddenly falls into the trap and is killed, and when the owner of such lands, who maintains the same in said condition and by an implied invitation for numerous years induce children to play thereon, know of the dangers lying in close proximity to the attractive place, quietly remains idle and takes no step to remove the threatened danger, is he to be



absolved from all liability resulting from such reckless, inhuman and unconscionable conduct? If he is not liable under these circumstances, then our case should be dismissed; otherwise the verdict and judgment should stand.

### ARGUMENT.

We shall not attempt to follow counsel through their somewhat extended argument on various assignments of error, in many of which they would have this Court, by following their suggestions, abandon the elementary and oft' repeated axiom that questions of fact must be submitted to the jury, and that some degree of conclusiveness must be placed upon the expression of the jury evidenced by its verdict. Courts will not invade, under circumstances here presented, the functions of the jury, and thus much of the fallacy of counsel's argument becomes apparent.

On pages 40 and 41 of their brief much stress is placed upon the question of the knowledge of defendant in error, with reference to the dangerous and unsafe condition of the premises of plaintiff in error, in a veiled attempt to charge him with contributory negligence in permitting his son to go unattended to the pool, well or cistern in which he subsequently met his death by drowning. The record will not bear them out in such a contention and the cases cited become unavailing, for at page 60 we quote from the testimony, which is undisputed, as follows:

"Q. Had you ever known your boy to go up there and play before?

A. No, sir."

Mrs. Thompson, mother of the deceased minor, testified as follows:

“Q. Did you ever know of the boy going up there on these premises to play, before the day he was drowned?”

A. No, sir.” (R., p. 52).

The second and third assignments (Brief, p. 42) go to the sufficiency of the evidence to sustain the verdict and will be discussed hereafter.

The third assignment of error (Brief, p. 42) complains of the Court’s order in permitting defendant in error to amend his complaint. The amendment complained of was permitted by the Court, and it is elementary that no error could be predicated upon such permission unless the trial Court abused the discretion which the rules and which precedent and authority vests in the Court, in the matter of granting amendments and otherwise presiding over the conduct of trials. Under the issues, and in view of the answer of plaintiff in error, and their affirmative plea of contributory negligence, their claim of surprise was not made in good faith, as the trial Court very properly determined. Again, the question covered by the amendment complained of was the subject of cross-examination by plaintiff in error, and defendant in error testified, as heretofore indicated, that he did not know, appreciate or understand the dangerous character of the premises of plaintiff in error. This evidence was adduced without objection (R., p. 60) and your Honors well know, as did the learned trial Court, that in accordance with the existing rule of court, evidence admitted without objection permits

of the pleadings being amended to conform to the proof. If our position under this assignment has not been sufficiently discussed, then your Honors' attention is respectfully directed to the language of the trial Court found upon page 158 of the Transcript of Record, from which we quote as follows:

"The Court: I think I shall do this: I shall permit you to do this upon these conditions: You may strike out entirely the words in the eighth paragraph 'was open and notorious up to the time of the death of Russell G. Moore and,' upon the condition that if the verdict should be in favor of the plaintiff *and the defendant shall thereupon make a showing* that they produced proof contrary to the implication of this language, that a new trial will be granted, and that, in case a new trial is granted, that you pay the costs of this trial."

The conditions were accepted, for, at page 158 of the Transcript, we find the following:

"The Court: Do you accept those conditions?"

"Mr. Plummer: Yes, we accept those conditions, your Honor." (T., p. 158).

Unable to substantiate their claim of "surprise," counsel for plaintiff in error failed to avail themselves of the conditions required by the Court, and their claim of error in this regard manifestly finds no support in the record before this Court.

The fifth assignment of error (Brief, p. 44) is identical with assignment No. 4, and what we have heretofore said with reference to that assignment likewise disposes of it.

The remaining assignments, two, three (Brief, p. 42) , and six (Brief, p. 44), and seven (Brief, p. 47), embrace the same questions, and partake of the nature

of a demurrer to the evidence, and go to the right of defendant in error to recover as a matter of law. These assignments will be considered collectively.

As nearly as can be gleaned from the character of argument presented in the opening brief of plaintiff in error, this Court is asked to adopt a rule of law which by numerous courts of accredited respectability has been dominated a cruel and wicked doctrine and unworthy of a civilized jurisprudence. They contend, with apparent seriousness, that no duty devolved upon plaintiff in error toward the minor son of defendant in error under the facts here presented and ask this Court to leave entirely out of view the tender years, lack of judgment and infirmity of understanding and comprehension of the child, and thus supplant property above humanity. They contend and expound a most inhuman and unwholesome doctrine to support their view that in sound legal theory a child of tender years can become a trespasser, and to thus visit upon him the consequences of his trespass as though he were of mature years and in the possession of faculties capable of learning and appreciating the dangers which beset him. But such claim lacks logic and is not regarded as established law. A few decisions, inapplicable as they will appear, are cited by counsel. The weight of authority and precedent dominates their theory as barbarous, and the rule is adopted and announced by decisions of humane and enlightened Courts, that the owner of premises, which, from their nature are especially attractive to children, who in obedience to their childish instincts

are likely to play in and about such places, and yet which is especially dangerous to them, is under the duty of exercising reasonable care to the end of keeping such premises in such a condition so as to prevent them from injuring themselves.

Before proceeding to a discussion of the authorities, your Honors' attention is directed to a record which evidences the dangerous condition of the premises maintained by plaintiff in error, the fact that such premises were attractive and inviting to children of tender years, and the further fact that for three years prior to the death of the minor son of defendant in error the plaintiff in error knew of the use being made of their premises as a play ground by children, and it is elementary that such knowledge and acquiescence amounted to an implied invitation to all of such children as were drawn, through childish instincts and curiosity, to the attractive premises of plaintiff in error.

Some discussion is found in the brief of plaintiff in error (page 50) about Schmidt Bros., claimed to be independent contractors, but this would not relieve plaintiff in error. The record abundantly evidences that plaintiff in error was the owner of the land in question and knew of the existence and dangerous condition of the well and premises.

From the testimony of James Hunt, superintendent of plaintiff in error (T., p. 40) we find:

Q. Did you have charge of the company's affairs at St. Maries?

A. Yes.



Q. Did you dig a well there yourself on these premises?

A. Yes, I did.

Q. What were you there for?

A. I was superintendent and general manager of their up-river business, the Coeur d'Alene Lumber Co.

*Testimony Oliver J. Thompson.*

Q. How large a town is St. Maries at this time?

A. Well, it was probably 1500 or near as I know. (T., p. 68).

Q. Did you ascertain at that time whether or not there was a well there?

A. I did. (T., p. 59).

Q. How deep was it?

A. As near as I could figure, it was something like six or eight feet. (T., p. 60).

Q. Did you see the sawdust pile there?

A. I did. (T., p. 57).

Q. Describe the condition that was in?

A. Well, it was a very big pile of sawdust on the north side of the hole, not quite so large around on the east side and around the south side, but it was higher, some several feet higher than the water. (T., p. 58).

Q. Where were the boys when you got them?

A. They were just at the edge of the water.

Q. How deep could you see down in the water?

A. Not very deep. The sawdust went down into the sides of the water, and you could possibly see in may be two feet from the edge of the water.

Q. Did you ascertain at that time whether or not there was a well there?

A. I did. (T., p. 59).

*Testimony Andrew Warner.*

The Court: You may state just what the conditions were there.

A. This pool of water, as I said a moment ago, was shallow near the edge, and I had stepped in but a short distance when I fell in. I didn't wade

in, gradually getting into deep water, but fell in. Therefore, the pool—of course it was straight down. \* \* \* (Tr., p. 73).

A. There was no fence there and folks quite commonly were in that section walking across it. It was rather used publicly. (T., p. 77).

A. There were pits in the sawdust pile that I remember seeing, such as children would make. (T., p. 78).

*Testimony Frank B. Jones.*

A. Well, sir, I was watching fire down there on that sawdust pile for the Coeur d'Alene people, and in watching the fire *there was more or less boys that played there around the sawdust pile and on those grounds.* \* \* \* (T., p. 103).

A. Oh, they would play there off and on; you would see them there every day perhaps. \* \* \* (T., p. 103).

Q. What was the condition of this hole here with reference to the edge of the water?

A. When I was there the sawdust had got down there, and there was practically no water at all because the sawdust covered the water to a great extent. There was some water of course; you could dip down through the sawdust and dip water. (T., p. 104).

Q. Could you see the bottom at any place there?

A. No, sir. (T., p. 105).

*Testimony Adam Howard.*

A. Well, yes, I have noticed children there quite frequently.

Q. What were they doing when you saw them?

A. Some of them were playing, and I had a couple of children there that were herding cows there. (T., p. 111).

*Testimony Grace Maynard Scott.*

A. Well, it was a very common occurrence to see children playing there; they used it as a play ground. (T., p. 119).

A. Sawdust attracts many children; they like to

put their bare feet in the sawdust and feel it running through their toes.

A. I have noticed them sliding down the sawdust upon our side. (T., p. 120).

*Testimony Elizabeth Maynard.*

Q. During the time you lived there before the boys were drowned, did you ever see children playing around on the sawdust pile?

A. Yes, sir. (T., p. 130).

Q. What did they appear to be playing?

A. Well, digging into the sawdust, and sliding down, and having a good time generally. (T., p. 130).

At page 51 of their brief some discussion is found with reference to the "attractive nuisance" theory, and counsel, after saying that "it is well settled that the doctrine of the 'Turntable Cases' will not be extended," cite as approving such expression the case of *Curtis vs. Quarry Co.* (Wash.), 79 Pac. 955. The inapplicability of this case is readily demonstrated, and was evidently overlooked by counsel. In *Bjork v. City of Tacoma*, 135 Pac. 1005, decided October 29th, 1913, the Supreme Court of Washington, referring to the *Curtis* case, says:

"The case of *Curtis vs. Tenino Stone Quarries*, 79 Pac. 955, is also distinguishable. The quarry was not in a city, and was 200 feet from any highway or public ground. *It was not permitted to be used as a common play ground, nor was it near one.* The child had been driven away a short time before the accident. The distinction is plain."

In *Harris v. Cowles*, 80 Pac. 537 (Wash.), cited by plaintiff in error (Brief, p. 51), involving injury to a child by catching his arm in a revolving door, of fair compartments, through which people constantly

passed, and which could not be locked or guarded and still be used, their doctrine is again repudiated, and they find no solace from such a citation as bearing upon the issues here involved.

In *Clark v. Northern Pacific*, 29 Wash. 139 (cited by counsel, Brief, p. 51), a bright boy, twelve years of age, was killed while passing through a railway yard, making a short cut to get to a circus. He was ordered off the company's property but refused to go. At page 146 we find the following:

"They and the deceased knew they were not invited upon the ground, for the reason that they were twice told by agents of respondents not to go there because of danger. His boy companions testified they all knew of the danger. At the encounter with the last switchman he gave 'peremptory command' that they should leave, but they disregarded the command."

For the sake of brevity we cannot follow counsel through a discussion of each case cited. The discussion of the three cases just disposed of, evidence, however, their hopeless inability to support their theory.

We do not question the logic of reasoning of the multitude of "trespasser" cases cited by counsel, in their application to adults, but we do insist that humane and enlightened courts evidence the inability of a child of tender years to be a trespasser in sound legal theory, and that children, being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees.

In the case of *Price et ux. v. Atchison Water Co.*, 50 Pac., 450 (Kansas), at page 451, the Court said:

“Everybody knowing the nature and instinct common to all boys must act accordingly. No person has a right to leave, even on his own land, dangerous machinery, calculated to attract and entice boys to it, there to be injured, unless he first take proper steps to guard against all danger; and any person who does thus leave dangerous machinery exposed, without first providing against all the danger, is guilty of negligence. It is a violation of the beneficent maxim, ‘*Sic utere tuo ut alienum non laedas.*’ But even trespassers have rights which cannot be ignored, as numerous cases which we might cite would show. *Railway Co. v. Fitzsimmons*, 22 Kan. 691. The reason upon which these cases proceed, and the authorities supporting the rule, are strongly set forth in *Keefe v. Railway Co.*, 21 Minn. 207. They are, in brief, that where a person maintains upon his premises anything dangerous to life or limb, and of a nature to invite the intrusion of children, he owes them a duty of precaution against harm, and is liable to them for injury from that thing, even though their own act, if not negligent, puts in operation its hurtful agency. One may not bait his premises with some dangerous instrument or quality, alluring to the incautious or vagrant, and then deny responsibility for the consequences of following the natural instincts of curiosity or amusement aroused thereby, without taking reasonable precautions to guard against the accidents liable to ensue. Rights can only be enjoyed subject to those limitations which regard for the weaknesses and deficiencies of others dictate to be humane and just. This rule has been applied, not only in the Turntable Cases, but to others in which dangerous situations have been negligently maintained, and especially to cases of death or injury by falling into unguarded pools or vats of water. *Car Works v. Cooper* (Ark.) 31 S. W. 154; *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484.”

In the case of *Consolidated Elec. Co. vs. Healey et ux.*, 70 Pac. 884 (Kansas), where a minor 10



years of age was injured by coming in contact with a charged electrical wire while climbing upon a railing close to such wire, the Court, at p. 885, said:

“As to the boy, who was not at the time on the highway proper, but who was engaged in a dangerous sport immediately outside of it, was the company negligent in maintaining its wires uninsulated, where he was liable to come in contact with them? To our minds there can be no doubt as to the answer. It was liable. To an adult it might not have been. To a small boy in the buoyancy of sport, and lacking the discretion of older years, it was liable, in view of the fact that it knew that children of his class were in the habit of venturing in dangerous proximity to its negligently kept wires. The place where the boy met his death was one of those dominated in the books ‘attractive nuisances,’ the keepers of which, according to those decisions which we regard as the sounder exposition of the law, are liable to one who without inculpatory fault on his part, is injured thereby.”

In *Biggs v. Consolidated Barb Wire Co.*, 56 Pac., 4, at page 5, the Court said:

“The common law, however, does not permit the owner of private grounds to keep thereon allurements to the natural instincts of human or animal kind, without taking reasonable precautions to insure the safety of such as may be thereby attracted to his premises. To maintain upon one’s property enticements to the ignorant or unwary is tantamount to an invitation to visit, and to inspect and enjoy; and in such cases the obligation to endeavor to protect from the dangers of the seductive instrument or place follows as justly as though the invitation had been express.” The Court quotes approvingly from the case of *Railway Co. v. Fitzsimmons*, 22 Kan. 691, when passing on the question of contributory negligence of the deceased: “‘Boys can seldom be said

to be negligent when they merely follow the irresistible impulses of their own natures—instincts common to all boys. In many cases where men, or boys approaching manhood, would be held to be negligent, younger boys, and boys with less intelligence, would not be. And the question of negligence is in nearly all cases one of fact for the jury, whether the person charged with negligence is of full age or not.” See, also, *Kinchlow v. Elevator Co.*, 57 Kan. 374, 46 Pac. 703; *Railway Co. v. Carlson*, 58 Kan. 62, 48 Pac. 635.”

That the child for whose death the case at bar was instituted was a technical trespasser or at most a mere licensee is an immaterial circumstance. A child, attracted to premises open and unguarded in a populous neighborhood by things maintained thereon enticing to the childish curiosity and instincts, is not a culpable trespasser in any sound sense.

The rule laid down by Thompson, *Negligence* (2nd Ed.), Sec. 1026, is as follows:

“This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed his inability to be a trespasser is sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult, and exonerates the person or corporation upon whose property he is a trespasser from any measure of duty towards him which they would not owe under the same circumstances toward an adult.”

The same writer, after admitting the fact that in many jurisdictions, the doctrine of trespass as a defense, even as applied to small children, must be regarded as established law, scathingly reprobating the doctrine as barbarous, says:

"Nevertheless, a few decisions of enlightened and humane courts are found, more or less tending to the conclusion that the owner of any machine or other thing which, from its nature, is especially attractive to children, who are likely to attempt to play with it in obedience to their childish instincts, and yet which is especially dangerous to them, is under the duty of exercising reasonable care to the end of keeping it fastened, guarded or protected so as to prevent them from injuring themselves while playing or coming in contact with it." Thompson, *Negligence* (2nd Ed.), Sec. 1031.

The rule is expressed in Vol. 3, Shearman & Redfield, *Negligence* (6th Ed.), Sec. 705, as follows:

"The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition, for they, being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees."

In *Haynes vs. Seattle*, 69 Wash. 419, 125 Pac. 147, the Court said:

"A child of tender years who meets with an injury upon the streets or upon the premises of a private owner, though a technical trespasser, may recover for such injury if the thing causing it has been left exposed and unguarded near the play ground or haunts of children and is of such a character as to be alluring or attractive to them, or such as to appeal to childish curiosity or instincts; this on the principle that children of tender years, being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees."

Citing:

*Illwaco R. & W. Co. v. Hedrick*, 1 Wash. 446,  
25 Pac. 335.

Nelson v. McLellan, 31 Wash. 208, 71 Pac. 747.  
McAllister v. Seattle B. & W. Co., 44 Wash. 179,  
87 Pac. 68.

Akin v. Bradley Engineering & Machinery Co.,  
48 Wash., 97, 92 Pac. 903.

Olson v. Gill Home Inv. Co., 58 Wash. 151, 108  
Pac. 140.

In Bjork v. Tacoma, 34 Wash. Dec. No. 3, 135  
Pac. 1005, Nov. 5, 1913, at page 160, it is said:

"The turntable and machinery cases, however, are in no just sense *sui generis*. They rest, as it seems to us, upon the one broad principle common to all cases of injury from dangerous premises and all cases of so-called 'attractive nuisances,' that there is always a duty due to society upon the owner of premises to take reasonable care to so use his own as not to injure another, a failure to observe which is negligence."

Citing:

Thompson, Negligence (2nd Ed.), Sec. 1033-1036.

Hydraulic Wks. Co. v. Orr, 83 Pa. St. 332.

Brausonis Admr. v. Labrat, 81 Ky. 638.

U. P. R. Co. v. McDonald, 152 U. S. 262.

Briggs v. C. Wire Co., 60 Kan. 217, 56 Pac. 4,  
44 L. R. A. 655.

In Union Pac. R. Co. v. McDonald, 152 U. S. 262,  
38 L. Ed. 441, quoting approvingly from the language of Chief Justice Cooley (*Powers v. Horlow*, 53 Mich. 507-514), it is said:

"Children, wherever they go, must be expected to act upon childish instincts and impulses, and others who are charged with a duty of care towards them must calculate upon this, and take precautions accordingly."

And at page 442, quoting approvingly from *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17, it is said:

"It knew that children were in the habit of fre-

quenting that locality and playing around the shaft house in the immediate vicinity of the stock pit. The slightest regard for the safety of these children would have suggested that there was danger of being so near a pit beneath the surface of which was concealed (except when snow, wind or rain prevailed) a mass of burning coals into which a child might fall and be burned to death. Under all these circumstances, the railroad company *ought not to be heard to say* that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no duty to make provisions."

See also:

- Snair & Triest Co. v. Freedman, 169 Fed. 1.
- Pierce v. Lyden, 157 Fed. 552 (C. C. A., 2nd Cir.).
- Bjork v. Tacoma, 135 Pac. 1005.
- Thompson, Negligence (2nd Ed.), 1026.
- Thompson, Negligence (2nd Ed.), 1031.
- 3 Sherman & R., Negligence (6th Ed.), 705.
- Hayners v. Seattle, 69 Wash. 419.
- Thompson, Negligence (2nd Ed.), 1033.
- Hydraulic W. Co. v. Orr, 83 Pa. St. 332.
- Brausonis (Admr.) vs. Labrat, 81 Ky. 638, 50 Am. Rep. 193.
- Briggs v. Consolidated B. W. Co., 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 655.
- Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206.
- Price v. Atchison Water Co., 58 Kan. 551, 50 Pac. 450.

In the case of *Pierce vs. Lyden*, *supra*, where boys had been in the habit of taking oil in small cans for lighting it on the ground and building fires, the defendant having left the oil in barrels from which the heads had been taken, the Court said:

"Knowledge of such notorious and continuous



practice as is shown in this case we think must be imputed to the defendant, and, were this not so, knowledge of the night watchman was the defendant's knowledge. Nothing is more attractive to boys than fire, and, as they had been for some six months in the habit of throwing the defendant's oil on fires made by them and this fact was actually known to his night watchman, we have no doubt that the question of defendant's negligence was properly presented to the jury."

In *Snair & Friest Co. v. Friedman* (*supra*), at page 8, it is said:

"The plaintiff at the time of her accident was 4½ years old, and there can be no question that, in the eyes of the law, by reason of her age, she lacked that discretion which would make her responsible for her conduct. She was legally incapable of contributory negligence or of being a trespasser. \* \* \* Why should not one who has a dangerous structure or appliance, whether on his own land, or the public highway, use ordinary care to protect those of such tender years as may without fault upon their part come within the danger to which the owner of such appliance or structure has exposed them? We think in reason and consonance with the legal principles by which the duty of individuals to protect others from the dangers that may result from the use of their own property is determined, this defendant owed a duty to children of tender years who, to their knowledge were accustomed to play on the public street near these beams, to use due care under the circumstances to prevent injury to such children as might come in contact therewith."

In *Franks v. Southern Cotton Oil Co.* (South Carolina), 12 L. R. A. N. S., 468, in which the subject is extensively discussed and supported by a wealth of citations, the following language is used:

"A child injured while trespassing has no right

of action, unless injured by the negligence of defendant, when the injury might have been avoided by ordinary care on defendant's part. But, when a child of tender years commits a technical trespass, and is injured by agencies that to an adult would be open and obvious warnings of danger, but not so to a child, he is not debarred from recovering, if the things instrumental in his injury were left exposed and unguarded, and were of such a character as likely to attract children, excite their curiosity, and lead to their injury while they were pursuing their childish instincts. Such dangerous and attractive instrumentalities become an invitation by implication."

In *Pekin v. McMahon*, 39 N. E. 484, 27 L. R. A. 206, the Court held that a pond or pit in a populous city, in which the water was from 5 to 14 feet deep, with timber and logs floating therein, on which children were in the habit of playing, renders the city liable if the place was found by jury sufficiently attractive to entice children into danger and to suggest the probability of an accident."

In *Cahill v. E. B. & A. I. Stone Co. (California)*, 153 Cal. 571, 86 Pac. 84, 19 L. R. A. (N. S.), page 1095, involving injury to a boy 12 years of age by falling beneath a railroad push car with which he was playing, the Court, at page 1097, said:

"For like reasons, one who places an attractive but dangerous contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owes the duty of exercising ordinary care to prevent such injury to them, and this because he is charged with knowledge of the fact that children are likely to be attracted thereto, and are usually unable to foresee, comprehend and avoid the danger into which he thus knowingly allures them."

One of the earliest cases decided by the United States Supreme Court was the case of *Sioux City & Pacific Railway Company vs. Stout*, 17 Wall. 657-665, 84 U. S. 657-665, 21 Law Ed. 745, and in that case the Court said as follows:

"The care and caution required of a child is according to his maturity and capacity only, and this is to be determined by the circumstances of each case. A railway company, while not bound to the same degree of care in regard to strangers who are unlawfully upon its premises that it owes to passengers, is not exempt from responsibility to such strangers for injuries from its tortious acts. *If, upon any construction which the jury is authorized to put upon the evidence, or by any inference it is authorized to draw from it, the conclusion of negligence can be justified, the defendant is not entitled to a nonsuit, but the question of negligence must be left to the jury.*

"\* \* \* That several boys were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employees of the defendant, is evidence from which the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case. \* \* \* Although the facts are undisputed, it is for the jury and not for the judge to determine, whether proper care was given, and whether they established negligence."

One of the recent leading cases upon this question is that of *Snair and Triest Company vs. Freedman*, 169 Fed. 1, decided by the Circuit Court of Appeals, found and reported in the 40th L. R. A. (N. S.), 369. In this case the Circuit Court of Appeals said as follows:

"Why should not one who has a dangerous struc-

ture or appliance, *whether on his own land* or located on a public highway, use ordinary care to protect not only those who are able to protect themselves by the use of their faculties and who are bound to make use of them as the ordinary experiences of mankind justifies us to expect, but also those of such tender years as may, without fault on their part, come within the danger to which the owner of such appliance or structure has exposed them? We think, in reason and in consonance with the legal principles by which the duty of individuals to protect others from the dangers that may result from the use of their own property is determined, and by which they are held responsible for their negligent acts in that regard, this defendant owed a duty to the children of tender years who, to its knowledge, were accustomed to play on the public street in the vicinity of these piles of beams, and also to play and sit thereon, to use due care under the circumstances to prevent the piles from being in such an unstable condition as would be likely to cause injury to such of these children as might come in contact therewith.

In *Shellenberger vs. Fisher*, 143 Fed. 937, 75 C. A. 9, Justice Sanborn writing the opinion of the Court, at page 11 quotes approvingly from *Ry. Co. vs. Stout*, 21 L. Ed. 745, and says:

"A child six years of age who lived three quarters of a mile distant from a railroad turntable was injured while operating it with two other boys, 9 and 10 years old, without right or license, and the Supreme Court sustained a judgment on the ground that the company owed a duty to these children, to use reasonable care to fasten or otherwise guard an article so attractive to children."

And in the same case, quoting from *Keef vs. M. & S. P. Ry Co.*, 21 Minn. 207, 18 Am. Rep. 393, Supreme Court of Minnesota, said:

"When it sets before young children a temptation



which it has reason to believe will lead them into danger it must use ordinary care to protect them from harm."

In the case of *Franks vs. Southern Cotton Oil Co.* (South Carolina), 58 S. E. 960, 12 L. R. A. (N. S.), p. 468, may be found a state of facts peculiarly alike, if not identical, to that here presented. From the syllabus we quote as follows:

"One who maintains in an open field near public highways where children are accustomed to resort to play, an unprotected, dangerous reservoir of water, is liable for the death of a child who, resorting to the reservoir to play, falls into it and is drowned."

The case finds support and cites approvingly *W. P. R. Co. vs. McDonald*, 152 U. S. 262, hereinbefore referred to, and a number of other cases, and, quoting from *Thompson on Negligence*, *Cooley on Torts* and *Bishop Noncontract Law*, dominates the statement that a child of tender years can be guilty of a legal trespass as a "cruel and wicked doctrine unworthy of a civilized jurisprudence," and using the language of Justice Cooley in *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, says:

"Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly."

In *McDermott vs. Burke* (Illinois), 100 N. E. 168, at p. 170, it is said:

"Under our decisions, which are most liberal to children, if the conditions are such that the owner may reasonably anticipate that children of such tender age as to be incapable of exercising proper care for their own safety may by their own instincts be



attracted to the dangerous thing and thereby exposed to danger, he will be liable to a child so attracted, resulting from leaving the dangerous thing exposed. Under such circumstances he would have good reason to expect that children, from their well known habits and nature, would be attracted and its maintenance would amount to an implied invitation, so they cannot be regarded as voluntary trespassers. *City of Pekin vs. McMahon* (Ill.), 27 L. R. A. 206."

In *Brown vs. Salt Lake City* (Utah), 93 Pac. 570, the Court said:

"If the owner places something upon his premises which is easily accessible to children, which is alluring and attractive to their childish propensities, and excites their curiosity and desire to play, it, in effect, amounts to an implied invitation to them to come upon the premises. \* \* \* If the thing is artificial, uncommon, attractive and dangerous, and may, with reasonable effort and expense be guarded, and made reasonably safe, then the duty to make it so may not be disregarded, and the jury may so find."

In the case of *Lewis vs. Cleveland C. C. & St. L. R. Co.* (Indiana), 84 N. E. 23, it is said that the courts of Indiana do not regard as a trespasser a child of tender years, attracted by something on the premises which appeals to his curiosity.

See also:

*Houston & T. C. R. Co. v. Simpson*, 60 Texas 103.  
*Ft. Worth etc. R. Co. v. Robertson* (Texas), 14 L. R. A. 781, 16 S. W. 1093.

*Lynchburg Tel. Co. v. Booker* (Virginia), 50 S. E. 148.

*Barrett vs. Southern Pacific Co.*, 91 Calif. 296, 27 Pac. 666.

*Pierce vs. Lyden*, 85 C. C. A. 312, 157 Fed. 552.

*Pierce vs. Atchison Water Co.*, 58 Kansas, 50 Pac. 450.

Kansas City vs. Siese, 71 Kansas, 80 Pac. 626.  
 Franks vs. Southern Oil Co., 12 L. R. A. (N. S.)  
 468, (South Carolina).  
 Tucker vs. Draper (Neb.), 54 L. R. A. 321, 86  
 N. W. 917.

In Tucker vs. Draper (*supra*) it is said:

"If I know that there is an open well upon my premises, and know that children of such tender years as to have no notion of their danger are continually playing around it, and I can obviate the danger with very little trouble to myself, and without injuring the premises or interfering with my own free use thereof, I owe an active duty to those children, and if I neglect that duty, and they fall into the well and are killed it is my negligence; I cannot urge their negligence as a defense, even though I have never invited or encouraged them expressly or impliedly to go upon the premises."

See also:

Chicago B. & Q. R. Co. v. Krayenbuhl (Neb.),  
 59 L. R. A. 91 N. W. 880.

Berg vs. B. B. Fuel Co. (Minnesota), 142, N. W.  
 321.

Keffe vs. Milwaukee etc. R. Co. (Minn), 21 Minn.  
 207, 18 Am. Rep. 393.

Kelly vs. Southern Wis. Ry. Co. (Wis.), 140  
 N. W. 60.

In Kelly vs. Southern Wis. Ry. Co. (*supra*) the Supreme Court of Wisconsin said:

"Conservation of child life and safety as to artificial perils, is one of such importance that ordinary care may well hold every one responsible for creating or maintaining a condition involving any such, with reasonable ground for apprehending that children of tender years may probably be allured thereinto. \* \* \* This Court has probably not taken a decided stand upon the broad line indicated, though the writer is of the opinion that it has, in logical effect, and would

assert it and defend it as a sound doctrine, demanded by precedent, principle and humanity.”

See also:

Birge vs. Gardner (Connecticut), 50 Am. Dec. 261.

Branson's Admr. vs. Lalerat (Kentucky), 50 Am. Rep. 193.

In the Birge case (*supra*) a person insecurely set a gate on his own premises beside a lane through which children were liable to pass. One, while doing so, took hold of and shook the gate, causing it to fall and break his leg. Such person was held liable.

In the Branson case (*supra*) a person piled lumber on his unfenced lot so timbers were liable to fall and injure any one within range. He had reasonable ground for believing children might play in the vicinity. That occurred. A timber fell, causing a child's death. The owner was held liable.

We have thus traced the doctrine for which we contend through the courts of last resort of a number of the states and the Supreme Court of the United States in the McDonald case, and have quoted the rule here applicable as announced by the text writers, from which a wealth of authority quotes approvingly. The question here presented is not a new one, however, and its solution will not lead your Honors into untrodden fields. As your Honors read the record here brought for your consideration it will immediately become apparent that you cannot escape the conclusion that we have here only a plain question of fact, the answer to which, in the absence

of error in its submission, must be found in the verdict of the jury.

In conclusion we earnestly contend that the record bountifully evidences that the plaintiff in error maintained its premises in a dangerous condition, that the attractiveness of its premises and its usage as a play ground for children it well knew, and that it failed in the performance of that duty which the law required of it. Again recalling the language contained in 3 Shearman & Redfield, Negligence (6th Ed.), Sec. 705, where it is said:

“The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition, for, they being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees,”

and in view of the record and the holdings of the courts, we earnestly pray an affirmance of the verdict and judgment heretofore rendered and entered.

Respectfully submitted,

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